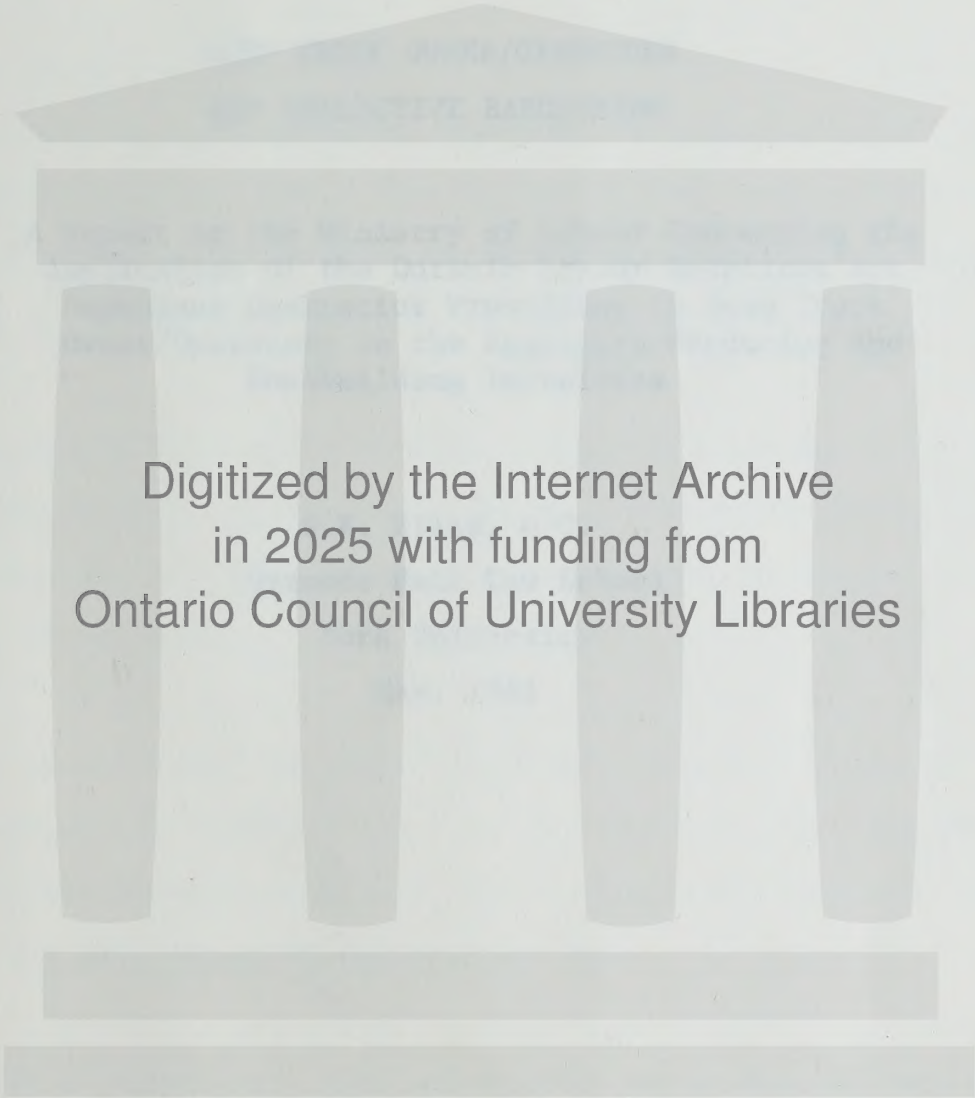
DUMP TRUCK OWNER/OPERATORS AND COLLECTIVE BARGAINING

PARTS I AND II AND A SUMMARY

BY S. R. ELLIS



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DUMP TRUCK OWNER/OPERATORS AND COLLECTIVE BARGAINING

A Report to the Ministry of Labour Concerning the Application of the Ontario Labour Relations Act Dependent Contractor Provisions to Dump Truck Owner/Operators in the Aggregate-Producing and Roadbuilding Industries

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May, 1981

SUMMARY OF INDUSTRIAL INQUIRY COMMISSION

"DUMP TRUCK OWNER/OPERATORS AND COLLECTIVE BARGAINING"

S. R. ELLIS, Q.C.

May, 1981

The Minister of Labour appointed Professor Ellis as an Industrial Inquiry Commissioner under The Labour Relations Act in November 1979 "to inquire into and report to the Minister of Labour concerning the application of the dependent contractor provisions of The Labour Relations Act in the aggregate-producing and road building industries".

The report tabled by the Minister on June 4th deals exclusively with the aggregate-producing industry. The final part of the Commissioner's report, dealing with the road building industry, is expected by the end of the summer.

The report reviews the activities of trade unions in organizing or attempting to organize dump truck owner/operators in the aggregate producing industry since 1976, when the "dependent contractor" provisions of The Labour Relations Act came into force.

While the Commissioner concludes that the owner/operators require some form of legislative protection to enable them to negotiate fair rates, he is not in favour of the present arrangements under The Labour Relations Act. He recommends that owner/operators working in the aggregate-producing industry be exempted from the dependent contractor

provisions of The Labour Relations Act. In support of that recommendation he makes the following observations:

. Trade unions do not have sufficient bargaining power to adequately protect the owner/operators.

. Aggregate producers are not using owner/operators to victimize their employees or avoid their organization by trade unions.

. The exclusion of owner/operators owning three to four trucks by the Ontario Labour Relations Board from coverage under the Act is divisive in organizational terms, relative to the needs of the whole group of owner/operators active in the industry and incompatible with the natural features of the owner/operator phenomenon.

. Some owner/operators are excluded from the Act by reason of Ontario Labour Relations Board decisions that owner/operators owning more than one truck or not receiving more than thirty to forty per cent of their income from one particular producer are ineligible for trade union representation under the Act.

. Trade unions representing pools of owner/operators working for particular aggregate producers have an incentive to attempt to exclude from the industry as a whole other owner/operators not within their particular pools.

. Collective bargaining under the Act authorizes and encourages unfair and unacceptable competition between classes of owner/operators as well as persons driving as "employees" in the traditional legal sense of the term.

. Aggregate producers have the ultimate power to determine who will be eligible for trade union representation because it is they who have the right to determine whether a particular owner/operator will receive the necessary proportion of his income from one particular producer so as to become eligible for trade union representation.

. The use of the "employee" concept is artificial in the context of this industry relative to both the producers' and owner/operators' actual perceptions as to their real status.

In place of coverage under The Labour Relations Act, Professor Ellis recommends what he terms a "collective marketing scheme" that would probably fall under the jurisdiction of The Ontario Highway Transport Board. The principle features of this "collective marketing scheme" would be as follows:

. Owner/operators would be free to sign minimum one-year representation contracts with authorized marketing agents.

. Authorized marketing agents would have the exclusive right to sell the trucking services of the owner/operators represented by them to aggregate producers and the marketing agents would be entitled to charge a commission on such sales.

. If authorized marketing agents and aggregate producers could not arrive at negotiated rates, rates would be established by a statutory board of arbitration which would be guided by a range of bench-mark rates established by the Ministry of Transport and Communications.

. Disputes between owner/operators and their authorized marketing agents would be subject to resolution by arbitration.

. Owner/operators represented by authorized marketing agents would still be free to solicit business on their own but their authorized marketing agent would have the first call on their services.

. The status of authorized marketing agent would be conferred by a specialized administrative tribunal.

. Any entity including a trade union could apply for the status of authorized marketing agent provided it was not a consumer of trucking services or either directly or indirectly related to a consumer of trucking services.

. Authorized marketing agents would be free to join an authorized marketing agent association which would have the right to set rates policies for its members subject to the safeguard of arbitration.

Professor Ellis has recommended that his proposed scheme be attempted on a pilot project basis before being implemented universally throughout the Province.

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PART I

THE AGGREGATE-PRODUCING INDUSTRY

Acknowledgement

Robert E. Salisbury, L.L.B., assisted with the Inquiry during the summer of 1980, and in the preparation of this Report I have found myself frequently indebted to the fine qualities of his research work.

Toronto, May 1981 S.R. Ellis, Q.C.

TABLE OF CONTENTS

PREFACE AND PURPOSE

1. The Assignment
2. General Background
3. The Arthurs' Article
4. The Purpose of the Study

SOURCES OF INFORMATION

CHAPTER I - DESCRIPTION OF THE TRUCKING ARRANGEMENTS

A. Introduction

B. Customer-Arranged Trucking

   1. Customer-Owned Trucks
   2. Trucking Companies
   3. Owner/Operators and One- ruck or Multi- ruck
   4. Transportation Brokers
   5. The "Broker"

C. Producer-Arranged Trucking

   1. The Influence of the Cyclical and Erratic Nature of the Need for Trucking
   2. Owner/Operators - the Regular Pools and the Floaters
   3. Trucking Companies and Tractor-Trailer Equipment
   4. Transportation Brokers

CHAPTER 2 - THE OWNER/OPERATED R-CLASS DUMP TRUCK INDUSTRY

1. Introduction and Preface
2. Size and Economic Significance
3. Non-Monetary Motivating Factors
4. The Owner/Operator's Many Roles
5. The Marketing Problem
6. The Overcrowding of the Industry - Its Causes and Effects
7. The Reasons for the Industry's Existence
8. The Role of the Tractor-Trailer

CHAPTER 3 - R-CLASS OWNER/OPERATORS AS ARTHURIAN DEPENDENT CONTRACTORS

CHAPTER 4 - THE SELF-INFLICTED WOUND ARGUMENT

CHAPTER 5 - IS COLLECTIVE BARGAINING AN APPROPRIATE REMEDY IN THE AGGREGATE-PRODUCING INDUSTRY?

1. Preface
2. OLRB Decisions as the Starting Point
3. The Black Art and the Aggregate Industry
4. Practical Problems with the Collective Bargaining Solutions
   - (a) The Union's Inability to Control the Labour Supply
     - (i) The Producers' Alternative
     - (ii) The Two Possible Control Strategies: Control of the Pit and Industry-Wide Bargaining
     - (iii) Control of the Pit - the Nelson and Dufferin Experience
     - (iv) Industry-Wide Bargaining
     - (v) Conclusion
   - (b) Deficiencies in the Coverage
   - (c) The Exclusion of the Multi-Truck Owner/Operator
   - (d) The Consequences of Leaving Eligibility for Union Protection in the Hands of the Producers
   - (e) The Anti-Collective Nature of the Collective Bargaining Solution
   - (f) The Perverse Nature of the Definition of Dependency
   - (g) The Problem of the Shifting Status
   - (h) The Black Art Aspect of the Collective Bargaining Solution
5. The Collective Bargaining Solution as a Vehicle for Unfair Competition
6. Summary and Conclusions

CHAPTER 6 - AN ALTERNATIVE PROPOSAL

1. The Problem Presented by Federal Anti-Combines Law
2. The Owner/Operator's Problem Viewed as a Marketing Problem Rather than a Labour Relations Problem
3. A Possible Collective Marketing Scheme
   - (a) Preface and Introduction
   - (b) The Definition of Owner/Operator
   - (c) General Description
   - (d) Authorized Marketing Agent
   - (e) The Agent-Owner/Operator Contract
   - (f) MTC Rate Bench-Marks

(g) The Arbitration Process

(h) Marketing Agent Common Pricing Policies

(i) Entry to the Industry

(j) Other Nuts and Bolts

(k) What the Scheme Might Achieve

4. Amendments to the Labour Relations Act

5. Transitional Arrangements

PREFACE AND PURPOSE

1. The Assignment

I have been asked to report to the Minister of Labour on the application of the dependent contractor provisions of the Ontario Labour Relations Act in the aggregate-producing and roadbuilding industries.*

The provisions in question are Sections 1(1)(ga) and (gb) and 6(4) introduced to the Act in 1975 (Bill 111) and proclaimed January 1, 1976. Their effect is to make a dependent contractor - as distinguished from an independent contractor - an "employee" for purposes of the Act and to empower the Labour Relations Board to certify a trade union as bargaining agent for a bargaining unit composed exclusively of such dependent contractor employees (subject to the right to include other types of employees - with the consent of a majority of the dependent contractors).

Of particular interest is the definition of "dependent contractor" (Section 1(1)(ga)) which reads as follows:

> (ga) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

2. General Background

Since their introduction in 1976, the dependent contractor provisions have been invoked primarily in respect of applications for certification brought by trade unions representing owner/operators of dump trucks engaged in the transport of "aggregate" (gravel, crushed stone and sand) from quarries or pits and, more

*A copy of my appointment is attached as Appendix A.

recently, of owner/operators of dump trucks engaged on constuction or roadbuilding projects.

In the four years to the end of 1980, the Ontario Labour Relations Board has had 23 occasions to deal with disputed applications for certification in which the status of the union members as dependent contractors has been an issue.[1] Thirteen of those cases involved owner/operators of dump trucks in the aggregate-producing industry and one involved owner/operators of dump trucks in the construction industry. The latter case[2], decided in November, 1980, was representative of another 25 similar applications then currently on file with the Board and awaiting the outcome of that first dump truck owner/operator application in the construction industry. Certifications appear to have been granted in respect of some 12 employers in the aggregate-producing industry, covering a total of approximately 250 owner/operators. The application concerning the construction industry was not successful.

My appointment to report to the Minister on the application of the new provisions to the aggregate-producing and roadbuilding industries was, as I understand it, occasioned by persistent strong representations from aggregate producers, contractors and trucking companies that the application of the collective bargaining regime to the owner/operators of dump trucks in those industries was drastically inappropriate and seriously incompatible with legitimate competitive interests of other players in those industries.

3. The Arthurs Article

The term "dependent contractor" was coined for Canadian purposes by Osgoode Hall Law School Professor H.W. Arthurs[3] in his famous article, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power", published in

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[1] See Appendix C for a list of the decided cases.

[2] In fact two cases decided together: Craftwood and Coreydale, [1980] OLRB Rep 1613.

[3] Professor Arthurs notes in his article that he first encountered the term in Schmidt, The Law of Labour Relations in Sweden (1962), Chap. 3 (by Axel Adlercreutz).

the University of Toronto Law Journal in 1965. And it is apparent that that article has been a pervasive major influence in the emergence of dependent contractor provisions in the labour legislation of this country as well as in the interpretation and application of that legislation.

British Columbia was the first to include dependent contractors - defined in general terms[4] - in its collective bargaining legislation. In Fownes Construction Co. Ltd. and Teamsters Local Union 213, [1974] 1 C.L.R.B.R. 453 - the first decision of the British Columbia Labour Relations Board to apply that legislation - the B.C. Board examined the new legislation's historical context and identified the Arthurs' article as "the major influence in the development of a new legal attitude in Canada" in respect of dependent contractors. The Board also quoted Professor Arthurs extensively in the development of its decision in that case.

The Ontario Labour Relations Board has in its turn consistently recognized what it recently[5] called the "landmark" article of Professor Arthurs, as the effective source of the dependent contractor concept and has relied on it in dealing with the interpretation problems arising in the application of the concept as defined in the Ontario Labour Relations Act.[6]

The application of the dependent contractor provisions to owner/operators of dump trucks in Ontario is one of the first substantial instances of the

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[4] The term was used in Canadian labour legislation for the first time in 1972 in Part V of the Canada Labour Code, but its definition there is specific to owner/operators of trucks and to fishermen who are parties to contracts with certain specific characteristics.

[5] Craftwood and Coreydale, Supra, footnote 2 at p. 1635.

[6] See, for example, the OLRB Decisions in Nelson Crushed Stone, [1977] O.L.R.B. Rep. 104, at 108; Pasinato & Abdo Contracting, [1977] O.L.R.B. Rep. 197 at 201, and Craftwood and Coreydale, Supra.

application of the "new legal attitude" towards dependent contractors fathered by the Arthurs' article, and it is impossible in any report on such application not to view the article as a primary source for the legal and policy issue analysis against which the application of the new legislation should be assessed. Such a view would be more than warranted simply by the authoritative status which has been accorded the article's analysis by the general legislative acceptance and the deference shown to it by commentators and labour relations tribunals. It is doubly justified by the excellence and thoroughness of the analysis itself to which its widespread acceptance is, of course, attributable. I will be making extensive references to the Arthurs' article and a copy of the entire article is attached as Appendix B.

4. The Purpose of the Study

The Arthurs' article identifies "dependent contractors" as a category of "competitors" in our economy (personified in self-employed truck drivers, peddlers, taxicab operators, farmers, fishermen and service station lessees) who require the "countervailing power" provided by collective action to escape their special economic vulnerability as individuals, caused by the dominance of a monopoly buyer or seller of their goods or services, or by disorganized market conditions. Because they are not "employees" as such, such competitors have traditionally not qualified for publicly-approved collective action under the collective bargaining system and have thereby remained subject to the general policy against collective action represented by the anti-combines law.

Professor Arthurs' thesis is not that all dependent contractors should qualify for the benefits of the collective bargaining regime. There are other vehicles for collective action such as legislatively authorized co-operatives or other producer-controlled marketing or purchasing arrangements which have been applied in the past in particular instances, notably in respect of dependent

contractors in the product market such as farmers and fishermen, and there will be new forms of collective action devised in the future. Implicitly, he contemplates as well that there may be situations where public policy considerations will necessitate leaving a particular class of dependent contractors without recourse to collective action.

Obviously, however, collective bargaining is a remedy which seems prima facie appropriate from a public policy perspective where the dependent contractor is active in the labour market. Professor Arthurs is concerned in connection with that category of case to point out the illogic of allowing the determination of the policy question concerning the appropriateness of the application of the collective bargaining regime to be determined by asking, Is the individual in question an "employee"? and by answering that question on the basis of technical tests developed in the common law for totally unrelated purposes. He is also concerned about the impact on the effective operation of the collective bargaining regime of the failure to extend the regime to individuals who compete directly in the labour market with acknowledged employees.

Professor Arthurs says in his article that he is not concerned, except in the most tentative way, to suggest "ultimate solutions".[7] He is sensitive, as well, to the "host of fundamental questions" which a decision to permit or encourage the use of the countervailing power represented by collective action by groups other than employees would raise. The following passage is of particular interest.

> The decision to permit or encourage the use of countervailing power, however, raises a host of fundamental questions. To what groups should this device be permitted? What tactics may legitimately be employed in wielding group power? What rights do non-members of the group have to refrain from joining, and what rights do members have to continue to belong? What assurances exist that the balance of power will not become overweighted in the other direction, or

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[7] Arthurs, p. 90.

> that the public will ultimately be better served? These questions lie beyond the scope of this study which has been concerned with existing legal problems rather than long-range policy implications. Moreover, to attempt to answer them by a single proposal would be to ignore the need for differentiated solutions fashioned in the context of economic and sociological facts. Instead, what can profitably be explored are the short-range institutional devices available through which intelligent working solutions may be tested to resolve existing legal anomalies and ambiguities.[8]

The only "short-range institutional device" actually proposed by Arthurs was to make dependent contractors who share a particular labour market with employees eligible for unionization.[9] It is this suggestion which has issued in the dependent contractor provisions now to be found in Canadian labour legislation;[10] and in reviewing the application of the Ontario provision to the owner/operators of dump trucks, it is important to keep in mind Professor Arthurs' characterization of his original suggestion as a short-range device for testing working solutions, and the need which he recognized for "differentiated solutions fashioned in the context of economic and sociological facts."

I view the purpose of this study of the application of the Ontario dependent contractor provisions to owner/operators of dump trucks to be an assessment of the legitimacy of the owner/operators' need for access to some form of countervailing power and an evaluation of the appropriateness of the unionization device as a solution to any such need.

The need for such assessment and evaluation in respect of the application of any device to any particular situation is implicit in Arthurs' original proposal. The fact that in Ontario the legislated expression of his unionization suggestions does not itself provide for any such assessment or evaluation and does

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[8] Arthurs, p. 114.

[9] Ibid., p. 114 eq seq.

[10] Some form of dependent contractor provisions may be found in the Canada Labour Code, and in the labour relations legislation of British Columbia, Manitoba, Newfoundland, Ontario and Saskatchewan.

constitute a type of "single proposal" which makes no allowance for the perhaps necessary "differentiated solutions" which Arthurs contemplated, represents an inherent limitation in the structure of the unionization device which would seem to justify a particular openness on the part of the Legislature to the possibility that with respect to any particular class of dependent contractors the dependent contractor provisions may not offer an appropriate solution notwithstanding their technical applicability.

Resort by the Minister of Labour to an industrial inquiry in response to serious agitation about the appropriateness of the unionization device in a particular situation would seem in the light of those circumstances to be especially justified.

SOURCES OF INFORMATION

In conducting this inquiry I have had recourse to a number of sources of information. Most important were the meetings which I held with various organizations and individuals involved with dump trucks in the aggregate-producing and roadbuilding industries and elsewhere. From March to July, 1980, I conducted 20 such meetings. In the course of those meetings I had the opportunity for what I believe to have been a full and frank exchange of information and discussion with representatives and members of the following organizations: each of the unions which have been involved in representing dump-truck owner/operators in applications for certification before the Labour Relations Board (the Teamsters Construction Council of Ontario, the Greater Northern Trucking Association, The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304 and the United Cement, Lime and Gypsum Workers International Union[11]); the Aggregate Producers Association of Ontario; the Ontario Trucking Association; the Ontario Sewer and Watermain Contractors Association, and the Ontario Roadbuilders Association. I have also met with officials of the Ontario Ministry of Transportation and Communications involved in the Licensing and Regulating of dump trucks and with a representative of the Highway Transport Board, as well as with representatives of some twenty-four companies including aggregate producers, contractors, trucking companies, and transportation brokers.

These representatives and officials totalled in all about seventy individuals who together represent a broad cross-section of substantial experience with the employment of dump trucks in Ontario from every perspective. A list of meetings and participants may be found in Appendix D.

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[11] The United Cement, Lime and Gypsum Workers International Union is the successor to the Mount Nemo Truckers Association at Nelson Crushed Stone which explains why the Mount Nemo name does not appear on the list of associations with whom I met notwithstanding its role as applicant in the first aggregate-producing industry, dependent contractor case the Ontario Board considered.

The meetings were structured as informal discussions, and to encourage frankness and a free flow of information I undertook to the participants in each meeting that I would not subsequently attribute opinions, views or suggestions to any specific individuals or organizations without obtaining their prior consent.

The meetings were arranged for the most part on the initiative of the participants pursuant to a general invitation which I issued in the form of a notice about the inquiry published in the Daily Commercial News. A copy of the notice is attached as Appendix E.

The same notice also invited the submission of written briefs. A number of briefs were received, some of which were presented in conjunction with one of the meetings. A list of the briefs appears in Appendix F.

I have, naturally, also studied the decisions of various Labour Relations Boards applying dependent contractor language and, of course, most particularly the decisions of the Ontario Labour Relations Board. In addition to their identification and analysis of the issues of interpretation raised in the application of the dependent contractor provisions, these decisions have proven in their discussion of the evidence and facts of each case to be, as well, a valuable additional source of information about many facets of the business of owning and operating dump trucks and the utilization and organization of dump truck transport in both the aggregate-producing industry and the construction industry.

The examinations by Mr. L. Strickland, Labour Relations Officer, of the truckers claimed by the applicant unions to be dependent contractors have also proved a fruitful source of information and insights concerning the business of owning and operating a dump truck. I have examined the transcripts of those examinations in the Nelson Crushed Stone case[12] (6 volumes - 51 witnesses), in the Superior Sand Gravel & Supplies case[13] (2 volumes - 10 witnesses), and in

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[12] Supra, page 3, footnote 6.

[13] [1973] O.L.R.B. Rep. 119.

the Indusmin case[14] (one volume - 9 witnesses).

Officials in each of the nine other provinces have assisted me with information concerning their legislation and their experience in extending the rights of collective action to dependent contractors and I have read with particular interest the reported cases and other accounts of the struggle by fishermen on both coasts to achieve collective bargaining.[15]

I have also examined the decisions of U.S. courts, primarily as cited by Professor Arthurs, in which in a legal context largely deprived by the Taft-Hartley Act of the benefit of the dependent contractor concept implicit in the early Hearst[16] recognition of a functional definition of "employee", the U.S. courts have struggled to provide collective bargaining remedies where resort to the use of so-called independent contractors by an employer can be shown to have been motivated by anti-union sentiment and a desire to rid himself of a union[17] and to extend legal protection to union activities such as picketing when applied in protection of the rights of employees threatened by direct competition of "independent" contractors.[18]

This study has had, as well, the important advantage of following three previous formal studies which were related in some significant measure to dump truck operation in Ontario, and I have relied heavily for information and historical context on the reports of these previous Inquiries. I refer here to:

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[14] [1977] O.L.R.B. Rep. 552.

[15] Including the January, 1981, Report of the Commission of Enquiry into the P.E.I. Fishery.

[16] Decision of the U.S. Supreme Court in Hearst v. N.L.R.B. (1944), 322 U.S. 111.

[17] See case cited in footnote 48, Arthurs, p. 97.

[18] See cases cited in footnotes 64 and 65, Arthurs, p. 99.

1) The 1958 Report of the Royal Commission Study by Mr. Justice W.E. Roach concerning the 1957, violence-attended attempt by the Teamsters Union to organize owner/operators of Dump Trucks in the Toronto Area ("The Roach Report").

2) The 1975 Report of the Ontario Ministerial Inquiry into the Dump Truck Industry by Commissioner M.L. Rapoport, Q.C., in which the Commissioner reported in respect of the "for-hire" dump truck industry on the following matters:

   a) supply and demand
   b) competition from out-of-province trucking
   c) present rates
   d) vehicle ownership
   e) the contractual relationships between the dump truck operators and aggregate producers and contractors.
   f) the safety of dump trucks and their operation
   g) the criteria for establishing economic rates, and
   h) control of entry into the industry.

3) The Report of the Select Committee on Highway Transportation of Goods, both the 1976 Interim Report and the 1977 Final Report, and in particular the chapter on dump trucks in Part VI of the Final Report.

I have, of course, also had the opportunity to read the Background Material for Bill 111 as prepared in 1975 by government officials as well as the companion volume entitled, Proposed Amendments to the Labour Relations Act, 1975.

In addition to the foregoing, I have had access to a number of dump-truck related briefs and submissions made over the years by interested parties to various authorities including the previous inquiries, the Premier, the Ministers of Labour

and of Transportation and Communications - both present and past - the 1967 Royal Commission Inquiry into Labour Disputes, and the Federal Standing Committee on Finance, Trade and Economic Affairs in respect of its deliberations on the Competition Bill (C-2).[19]

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[19] See the Bibliography, Appendix G.

CHAPTER I
DESCRIPTION OF THE TRUCKING ARRANGEMENTS

A. Introduction

The part of the aggregate-producing industry on which the dependent contractor provisions have impacted is, of course, transport of aggregate from the pits and quarries operated by the "producers" to the locations where it is consumed.[20] I will hereafter use the term "pit" to include both pits and quarries.

The transportation of aggregates is handled through a variety of arrangements. A substantial proportion of the total tonnage is picked up at the pits by customers or through trucking arrangements made by customers. The balance is transported through trucking arrangements made by the producer. The proportion of customer-arranged trucking to producer-arranged trucking varies widely from pit to pit. I have not found it possible to determine the overall proportion on a province-wide basis but there is no doubt that customer-arranged trucking is a significant part of the transportation picture in the industry - perhaps 30 to 40% of the total.

Both producers and customers typically resort to a variety of trucking arrangements. For convenience, I will deal first with the typical customer arrangements.

B. CUSTOMER-ARRANGED TRUCKING

1. Customer-owned Trucks

In the first place, it is not uncommon for major consumers such as ready-mix concrete companies to transport aggregate from the pits to their plants using a fleet of trucks which they own themselves and which are driven by their own employees.

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[20] It is assumed that readers of the Report will be generally familiar with the nature of the aggregate-producing industry in Ontario in other respects. See in this respect the Ontario Mineral Aggregate Party, A Policy for Mineral Aggregate Resource Management in Ontario, a Report to Ministry of Natural Resources, 1976.

2. Trucking Companies

Customers will also contract the transportation of aggregates to trucking companies. A "trucking company", as I will use the term, means an organization which is not itself primarily a consumer of aggregate, but is in the business of owning and operating a number of trucks driven by its own employees.

(Because of the variety of transportation arrangements and the lack of standard terminology which I encountered in my study, it will often be necessary to define certain terms where they first appear in this Report. The reader should keep in mind that thereafter I will use the term in its defined sense.)

3. Owner/Operators: One-truck or Multi-truck

Customers will also engage directly one-truck owner/operators or multi-truck owner/operators. By "one-truck owner/operators" I mean individuals who are in the business of operating one dump truck which they themselves own and drive. By "multi-truck owner/operators" I mean individuals who are in the business of operating a small number of dump trucks which they own and one of which they drive themselves. The other truck or trucks that multi-truck owner/operators own will be driven by their employees who are typically relatives or close friends. Multi-truck owner/operators frequently are organized in partnerships or as small limited companies, but their major characteristic from the point of view of this study remains the fact that the business is small enough that the substantive "owner" or "owners" of the business continue to be workmen - regularly engaged in driving one of their own trucks.

4. Transportation Brokers

Customers will also arrange for transport of aggregates by one-truck or multi-truck owner/operators through the services of a transportation broker. I use the term "transportation broker" to refer to a person or an organization who owns very few, if any, trucks of his own, but who acts as a middleman between

consumers of trucking transportation on the one hand and a "stable" of one-truck or multi-truck owner/operators for whom he regularly provides trucking business and who will typically get a large portion of their business through him. Not all transportation brokers act like a broker in the traditional sense of the term, taking their compensation as a commission - a percentage of the value of the business delivered to their clients - with the trucking contracts being between the customer and the owner/operator client. It is not unusual for the customer to contract the trucking directly with the broker as principal with the broker in effect subcontracting it to the owner/operators. Where that happens, the only difference between the "transportation broker" and the "trucking company" is the major utilization by the broker of other peoples' trucks. It may also be noted that most trucking companies will act as a transportation broker (in the sub-contracting style) when the demands for their trucking services outrun the capacity of their own trucks, and similarly, transportation brokers may also operate some of their own equipment.

5. The "Broker"

Dealing with the transportation broker leads me to the terminology problem with the word "broker". It is a word that is used extensively in the dump truck industry. The problem is that different people use it to refer to different things. There appear to be three recognized meanings of the term. First of all, the term is used when people talk about the transportation broker. Most often, he is simply called a "broker". Secondly, for reasons that remain obscure to me, the term is often used to describe any owner/operator. The third common use is as a description of a one-truck owner/operator who does not have his own "R" license[21] and who enters into an arrangement with a trucking company or with an

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[21] For a description of the licensing requirements as they apply in the dump-truck industry and particularly in the aggregate-producing industry, see infra, p. 20. See also infra, page 28, footnote 36.

aggregate consumer operating its own dump trucks whereby the title to his truck is temporarily transferred into the name of the trucking company or the consumer and the truck is operated by the owner/operator under the trucking company or consumer's "R" license. I understand that the term "broker" used in this last sense is also descriptive of arrangements that are even more common in the general trucking industry. In this Report I intend to use the term "broker" only in this third sense. Where I have indicated above that trucking companies or transportation brokers or consumers may own their own trucks, I should be taken to be recognizing that amongst the trucks "owned" by such organizations there will be some number, not I think in the dump truck industry a very large proportion, but some number that are operated by "brokers" in this third sense of the term.

C. PRODUCER-ARRANGED TRUCKING

The producer-arranged trucking which is the largest part of aggregate trucking represents the same variety of arrangements but with different emphasis. The producers do not typically employ their own trucking equipment. They will sometimes have one or two trucks which they own and which are operated by their own employees, but for the most part they employ other people's trucks. There are, for example, major pits which employ no trucks of their own at all.

1. The Influence of the Cyclical and Erratic Nature of the Need for Trucking

The trucking arrangements of producers reflect most importantly the cyclical nature of the transportation needs in the aggregate-producing industry. Business is for obvious reasons seasonal, peaking sharply in the late summer and fall with a very low output during the winter months. It is clearly uneconomical for a producer to equip itself with the number of trucks it would require to cope with the peak transport demands of its business, unless it went into the trucking business and could find alternate employment for its trucks during the off season.

Another peculiarity about the business which has an important bearing on the trucking arrangements is the erratic variation in demand for trucking from day to day even during the busy season. It is impossible for a dispatcher at a particular pit to predict the number of trucks he will need on any particular day. While large long-term contracts for the supply of aggregates do exist, more typically aggregate is ordered by consumers on short notice as and when it is required, and delivery demands are substantially influenced by the weather, the progress of the job that requires the aggregate, etc. Stockpiling at the user's site is normally not feasible. Thus, in addition to the serious problem presented by the overall sharply cyclical nature of the demand for aggregate trucking the aggregate producers must also find trucking arrangements which are quickly responsive to unexpectedly heavy delivery demands and tolerant of unpredictable demand lapses.

By and large, producers have found it economic to let other people do their trucking for them. The practice of customer pick-up to which I have already referred no doubt in part reflects the producer's inherent difficulty with his own trucking arrangements. But obviously not all customers are equipped to haul aggregate. Indeed, as we have noted, the majority of them are not. The business requires the producer to deliver a substantial proportion of his product, and he typically accomplishes this through trucking arrangements with either owner/operators or trucking companies.

2. Owner/Operators - The Regular Pools and the Floaters

The producer's arrangements with owner/operators are of two different kinds. There are the casual arrangements made with the type of owner/operator which the industry refers to as "floaters" or "gypsies", made as the need arises to deal with situations where the demands on the producer's more usual trucking arrangements exceed their capacity. When that happens, the producer's dispatcher at the pit will have a list of floaters whom he will call and ask to come in and haul

some aggregate for him, or he may contact a transportation broker.

The more significant arrangement that producers have with owner/operators, however, are the arrangements with a particular group of owner/operators whose truck or trucks find regular employment at the producer's pit. I will refer to these owner/operators as the producer's "regular pool" of owner/operators. This regular pool typically includes both one-truck and multi-truck owner/operators. The owner/operators in the pool may get as much as 80 to 90% of their total annual business from the one producer's pit and in return for being granted preference for the business over owner/operators not in the pool, they will hold themselves available to haul aggregate from that producer's pit as and when the need arises. The producers pay owner/operators, including those in the regular pool, only on a per load basis. When the dispatcher at the pit has no orders to fill, the regular trucks sit idle waiting for orders to come in. There is no compensation for waiting time.

It is the regular pools of owner/operators who have sought certification under the dependent contractor provisions of the Labour Relations Act.

3. Trucking Companies and Tractor-Trailer Equipment

The producers' arrangements with trucking companies typically relate to large volume supply contracts and the longer distance runs where the use of tractor-trailer dump vehicles is particularly advantageous. The tractor-trailer dump truck, which represents a relatively recent technological development in the dump truck industry, does not to date appear to have attracted very much interest from owner/operators, and the use of tractor-trailer equipment tends to be the monopoly of trucking companies. In fact, it would appear that the emergence of trucking companies as an integral part of the aggregate producers' trucking arrangements parallels the development of the tractor-trailer equipment and represents a net shift of the aggregate producers' trucking business away from the owner/operators

and their single-axle and tandem dump truck equipment to the trucking companies and the tractor-trailers. The tractor-trailers with their economy of scale are, therefore, serious competitors of the owner/operators in the most stable part of the aggregate producers' trucking business, and this competition is obviously a factor of some substantial significance when one comes to consider the application of the dependent contractor provisions of the Labour Relations Act in the aggregate-producing industry.

As some indication of the relative significance of the trucking companies' present role in the aggregate trucking business, I can report that at one of the largest pits in Ontario, trucking companies currently account for about two-thirds of the tonnage moved by producer-arranged transport. However, one would expect the proportion to fall off substantially as the size of the pit decreased and the relative significance of "local" business increased.

4. Transportation Brokers

Before leaving the question of the producer's trucking arrangements, I should also mention their occasional resort to arrangements with transportation brokers for the services of owner/operators. In the past, this has usually occurred only as part of a dispatcher's ad hoc search for trucking capacity after the pit's regular pool of owner/operators are fully engaged. More recently, and, it is not unfair to say at least in part as a response by producers to the implications of the dependent contractor provisions of the Labour Relations Act,[22] there appears to be considerable interest in establishing regular-pool arrangements through the services of transportation brokers.

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[22]See in this connection, A. Cunido Haulage, [1980] O.L.R.B. Rep. 679.

CHAPTER 2

THE OWNER-OPERATED R-CLASS DUMP TRUCK INDUSTRY

1. Introduction and Preface

The focal point of the controversy over the application of the dependent contractor provisions of the Act in the aggregate-producing industry is, of course, the owner/operator part of the aggregate producers' transport arrangements. Understanding the issues surrounding the application of these provisions to those arrangements must begin with an understanding of the nature of the owner-operated R-Class dump truck business.

It goes without saying, of course, that the trucking of aggregates is only a part of the dump truck owner/operators' market. Dump trucks have a wide range of applications in the hauling of bulk materials. The owner/operators who work in the aggregate-producing industry (and in the construction and roadbuilding industries) are public carriers licenced under the Public Commercial Vehicles Act. Their licence classification is Class "R" which is defined as follows:[22a]

> "Class R - authorizing the licensee to conduct a commercial vehicle service exclusively for the transportation other than by a tank truck or tank trailer, of,
>
> (i) sand, gravel, earth, crushed or uncut rock and stone, asphalt mixes, slag and rubble, and
>
> (ii) salt, calcium chloride, a mixture of sand and salt, and asphalt mixes directly to highway construction or maintenance sites or to stockpiles for further use on highway construction or maintenance sites.

The licences are geographically restricted as well. The province is divided into five regions and each operator is licenced for a minimum of <u>two</u> regions. Authority to operate in additional regions may be obtained if the Ontario Highway Transport Board, which certifies the public necessity and need in respect of new licence applications, can be satisfied as to the public necessity for the additional authorization.

[22a] Section 6(3), Public Commercial Vehicles Act, R.S.O. 1970, c. 375, as amended by Stats. Ont. 1975 (2nd Sess.), c. 7, s. 2(3).

Utilization of a dump truck in other bulk materials transport such as agricultural produce requires different licences and, typically, owner/operators of dump trucks active in the aggregate-producing, roadbuilding and construction industries will have only the "R" licence.[22b]

Trucks may also, however, be operated within the boundaries of urban municipalities without an "R" licence under the authority of municipal by-laws and there are devices in the trucking industry generally such as temporary transfers of ownership of the truck to other licence-holders or lease arrangements with private operators which provide R-licenced owner/operators with access to bulk transport business not covered by their own licence. Snow-removal work, the transport of agricultural produce and, in the north, the winter transport of logs by dump trucks modified by the temporary removal of the box, are examples of the range of business open to the owner/operator of a dump truck beyond the "R" class materials.

It would appear as well that the business will also, on occasion, when need and opportunity coincide, encompass the transportation of bulk materials not covered by the "R" licence or any other legal arrangement. However, it is impossible to gauge the extent of this "bootleg" transport business and I have ignored it for purposes of my Report.

The business of any particular owner/operator is usually specialized in respect of one particular kind of bulk transport - such as aggregate - but the owner-operated dump truck industry is to be understood from the more general perspective of the range of business opportunities open to its members.

2. Size and Economic Significance

The operation of dump trucks by owner/operators with "R" licences is an industry onto itself of considerable economic significance. Ministry of Transport

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[22b] It is common, however, for owner/operators to also hold Municipal Cartage licences.

records for 1979-80 indicate that there were in that year approximately 4400 people holding "R" licences for three or fewer trucks.[23] The same records indicate that these 4400 people were operating approximately 5500 dump trucks[24] - an average of about 1.3 trucks per licencee.

It is known, however, that of the "R" licences issued to trucking companies (i.e. people holding licences for more than three trucks), some proportion are in fact being utilized by owner/operators under the "broker" arrangement referred to previously.[25] It is therefore impossible to derive an accurate total of the number of people in this province who are currently engaged as owner/operators of "R" licenced dump trucks but it is apparent that the figure must be close to 5000. Application of the average number of trucks per owner/operator derived from the records indicates, then, approximately 6500 dump trucks being operated by "R"-class owner/operators in Ontario.

The economic implications of that figure are significant.

If one assumes that the average load of a dump truck is 16 tons - the figure

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[23]For purposes of this Report, I have made the arbitrary assumption that ownership of more than three trucks will effectively take an individual out of the owner/operator category and into the trucking company category. It may be noted that in the Province of Quebec's Bulk Trucking Legislation there was originally a distinction between "trucking companies" and "artisan" truckers which was set at the ownership of four trucks. See Quebec Transport Act, 1972, c. 55, Regulation 12 respecting bulk trucking made under Order in Council 238, 9-73, dated 8 June, 1973, as amended. But see Reg. 77-356, O.C. 2079-77 dated June 22, 1977, Section 60, and now Reg. 112, dated April, 1978.

[24]The figures include tractors for tractor-trailer dump equipment. However, most tractor-trailer equipment is operated by trucking companies and, accordingly, only a small proportion of this figure will be tractors.

[25]Supra pp. 16 and 17. It would also appear that there are some number of dump trucks being operated in the "R"-class industry without any PCV licence. See Craftwood and Coreydale, supra, page 2, footnote 2, where of six truckers examined two were not licenced under the PCV Act.

used by the MTC in its calculation of minimum dump truck rates[26] - and that each truck works on the average 40% of the normal working hours available over the course of a year and averages, say, seven loads for each eight hours of work and transports them an average of 10 miles,[27] it becomes apparent that we are looking at an industry of small businessmen hauling some 75 million tons per year of the things R-licenced dump trucks haul, and grossing, potentially at least, something in the order of $100,000,000.[28]

If we also accept MTC figures on the average price of a typical tandem (50,000 pounds gross weight, gasoline engine) of $34,000 in 1980[29] and $18,000 in 1975,[30] and the depreciation rate and "economic life" assumptions which MTC makes in its minimum rate calculations,[31] the average capital investment in the owner-operated R-class dump truck industry in 1980 can be calculated at something in the order of $110,000,000.

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[26]The Ministry of Transportation and Communication annually establishes a minimum dump truck rate which it requires to be paid by contractors working on MTC projects for the hauling of "R" licence materials. This will be discussed at greater length below. Details of the 1975 calculation may be found reported in Chapter 1, of Part VI of the Final Report of the Select Committee on Highway Transportation of Goods, 1977, at p. 16.

[27]The 40%, seven loads per day and 10 mile average trip figures are no more than educated guesses. No actual data is available for the whole of the owner-operated "R" licence dump truck business. MTC figures do indicate that a 10-mile trip and return will take on the average about one hour per load.

[28]The MTC minimum rates for 1980 indicate $1.43 per ton for a 10-mile haul. I have characterized the gross income as "potential" because it is well-known that in the industry generally the rates paid typically fall well below the MTC minimums.

[29]As given to me verbally.

[30]The Final Report of the Select Committee, Part VI, Chapter 1, p. 19.

[31]Ibid.

The assumptions on which these various conclusions have been based are, I believe, convervative, but obviously they are too speculative to justify treating the conclusions as anything more than indications of the facts. However, even with that reservation, it is apparent from the foregoing that owning and operating "R"-licenced dump trucks is a significant small-business industry in this province.

3. Non-Monetary Motivating Factors

The owner-operated R-class dump truck industry has a number of special characteristics which seem particularly relevant to the issues of concern to this study. One of these is the non-monetary motivating factors that seem to be at play in this industry. One has the strong impression that owner/operators are attracted to the dump truck business for reasons that have perhaps as much to do with a choice of lifestyle as with the profit incentive. I don't believe, for example, that it is an unduly romantic notion to suggest that people who are attracted to truck driving as a business are, generally speaking, people who get a real pleasure from driving a motor vehicle. One does not have to be a psychologist to recognize the common experience of mankind that the operation of a mobile piece of machinery has an inherent fascination. One would not want, of course, to attach too much significance to this influence. It would be naive to suggest that a person would make a career of owning and driving a dump truck and enduring the frustrations and difficulties which it clearly entails simply because one likes to drive. But that the attraction of driving is a special part of the "psychology" of the business must, I believe, be true.

Another obvious, non-monetary, motivating factor is simply the pleasure of ownership. The self-evident attention that is paid to the appearance of these vehicles, the "extras" with which the truck cabs are often equipped, and the common practice of christening the vehicles with personal names are the tell-tale indications that many owner/operators have the same kind of personal interest in

their trucks as many people have in their automobiles.

Present in this business, too, are all the motivating factors involved in being in any business for oneself: the hope for independence, the sense of being in control of one's own schedule, and the potential for economic rewards tied to the success of the business and free from the inherent limitations of an hourly-based wage or salary. Obviously, the resort to union organization by many members of this industry speak to the serious limitations in the achievement of these goals, but the existence of these goals and the extent to which they are thwarted by the realities of the business remain an important part of the pscyhology of the business and constitute, in my opinion, a factor of significance for this study.

By dwelling on these non-monetary motivating factors, I do not mean to disparage the importance of monetary considerations. From the income earned by his truck, after paying his monthly purchase-price installment (principal and interest), his operating cost - fuel and oil, tires, insurance and regular maintenance - and the cost of repairs, the owner/operator must meet the reasonable income expectations of himself and his family. Obviously once in the business, maintaining that income at a sufficient level - i.e. keeping the truck working and at reasonable rates - will be his major preoccupation. And it is clear that it is not an easy achievement. I am advised that there is a significant number of owner/operators who go bankrupt each year as a result of being unable to earn enough with the truck to cover overhead and expenses. The average "life" of an owner/operator in this industry as determined by the Rapoport Inquiry in 1975 was only three years.[32] To the marginal operators, the factors referred to above which seem likely to have helped motivate their entry into the business would

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[32]See page 47 of the Rapoport Report.

quickly lose their significance. But to the successful operators, the personal pleasures associated with the job would continue to contribute significantly to their satisfaction with the business.

4. The Owner/Operator's Many Roles

Another unique feature of the owner-operated dump truck business is the multiplicity of roles that owner/operators play in their business. They, of course, drive the truck (or one of their trucks) themselves. They also do most of their own maintenance work. They are the manager, and in the case of the multi-truck owner/operators they are also their own personnel directors. Perhaps most significantly of all, they are their own salesmen and sales managers.

The combination of roles in the single individual, coupled with the existence of the non-commercial motivating factors mentioned above gives to the operation of the owner/operators' business a unique flexibility and a particularly human face, and distinguishes the nature and characteristic of their operation from that of the trucking companies in ways that are of particular importance to the issues raised by this study.

5. The Marketing Problem

The fact that the owner/operators act as their own salesmen may be a feature of their business that is of particular significance. They not only drive the truck but they also must find work for the truck. The evident practical difficulties in finding work for a truck while one is driving it must contribute significantly, in my opinion, to what are obviously serious "marketing" inefficiencies in the owner/operator part of the dump truck business.

The process of getting the people who have dump trucks together with the people who need dump trucks in a market characterized by large numbers of individual truckers, a widely dispersed, largely anonymous, customer population, and erratic and volatile demand patterns, is likely to be an inefficient process

under any circumstances. That owner/operators must pursue that process on a part-time, largely after-hours basis is a further complication of considerable practical importance. The owner/operators' marketing problem would appear to be a central characteristic of his business. It largely explains the continued success of the much maligned transportation broker[33] who, in effect, provides the owner/operators in his stable with an efficient sales department.

Together with the excessive competition caused by the characteristic overcrowding in the business,[34] the marketing problem goes a long way to explaining the owner/operators' propensity for dependent relationships with any source of reasonably regular work and thus may be seen to have played a large role in the developments which have led to the application to the aggregate-producing industry of the dependent contractor collective bargaining regime.

6. The Overcrowding of the Industry - Its Causes and Effects

I have just referred in passing to another fundamental characteristic of the owner-operated R-class dump truck business which is its seemingly permanent state of overpopulation and the ills of excessive competition characteristic of such a condition. Here again, I have not been able to find any source of statistics that would demonstrate that the supply of dump trucks substantially exceeds the demands. But certainly, it is a pervasive impression in the industry that such is the case.[35]

The explanation usually offered for this phenomenon is that the entry to the business for owner/operators has historically been dead easy, certainly as

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[33] There is evidently considerable discontent with the way in which transportation brokers operate, taking, it is said, undue advantage of dependent owner/operators. It is not clear to me, however, that the complaints emanate very strongly from owner/operators themselves.

[34] See below.

[35] "The proliferation of dump-truck operators has tended to make this a very marginal operation" - Ontario Highway Transport Board, Annual Report, 1965. ". . . it appears that . . . there were - and it was submitted there still are - too many truck owners relying for their livelihood on this business. . ." - Roach Report, 1958, p. 3.

compared to most other businesses. There are no educational or training requirements beyond the ability to drive. The financing arrangements which have been available from truck manufacturers and dealers have meant that very little actual cash investment is required. Indeed, it is not unknown for a new owner/operator to acquire a truck with no cash investment whatever.

It is true that since 1975 the owner/operator of a dump truck has required an "R" licence approved by the Ontario Highway Transport Board before he can enter the business, but it appears that until very recently, as a matter of Board policy, "R" licences have been available to one-truck owner/operators almost for the asking.[36]

This ease of entry into the business is apparently considered by many people to be the root cause of what is perceived as a permanently overpopulated truck market.

It is important to notice, however, that it is not just the ease of entry to the business that creates the problem of overcrowding. The sharply cyclical and erratic nature of the demand for trucking seems likely to be a more fundamental cause of the problem. If the requirements for R-class dump trucks in the aggregate-producing industry and in other sectors of the economy are to be sufficiently satisfied in the two or three months of peak demand in the late summer and fall of each year, it must follow that the supply will substantially exceed the demand at all other times. Dump trucks are not very adaptable in the kind of work that they can be turned to, and while in the winter time there is some additional work to be found in snow removal, snow plowing, road sanding, and log transportation, I am advised that it does not begin to take up the

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[36]This policy has recently changed and it appears that serious attempts are now being made to assess the need for trucks in the areas of the province for which new "R" licences are sought before issuing new licences even to individual owner/operators. See the Ontario Highway Transport Board, 1979 Report on Procedures and Policies for the Regulation of Class "R" Operations for a thorough discussion of this development and of the history of dump truck licencing in this province.

off-season slack.

I have seen nothing to suggest that the supply is excessive relative to the peak demands, and I suspect that the pervasive impression of over-supply may be based largely on experiences during the off-peak periods which, of course, will predominate.

Given the strong economic pressures that will exist to ensure that the dump truck requirements during peak demand periods are met, and the rather short season of peak demand, it would appear that the overcrowding of the R-Class dump truck industry for most of the year cannot be put down merely to the irrational result of too easy an entry to the business but is to a significant extent the result of the very structure of the industry.

If I am right in identifying overcrowding as a natural and permanent feature of the R-Class dump truck industry at large and, therefore, of the owner/operator part of the industry in particular, then I have identified a feature of singular importance to my study. For it is apparent that the drive for union protection amongst owner/operators has been primarily motivated by the owner/operators' sense of being victimized by the seemingly perpetual buyer's market in which they operate. The fact that the buyer's market may be perpetual by definition is a very important consideration for anyone concerned with the status of owner/operators as "Arthurian" dependent contractors and the appropriateness of the application of the labour relations regime in the owner/operated dump truck industry.

7. The Reasons for the Industry's Existence

Paradoxically, in my opinion the same sharply cyclical and erratic demand for R-Class dump truck capacity which produces the permanent condition of over-supply for much of the year is at the same time a root cause of the existence of the R-Class owner/operator industry. The seasonal and weather-related nature

of the demand for R-Class dump truck capacity imposes on the economy an unavoidable, special cost of carrying unneeded trucking capacity during off-peak periods and weather-dictated down-time. In my opinion, the owner/operator part of the R-Class dump truck industry is to be understood most fundamentally as an economic phenomenon which has evolved in response to those special costs of dump truck supply.

As I have already indicated, neither the producers nor the trucking companies can readily handle the erratic demand and substantial down-time involved in much of the trucking of aggregate and other R-Class materials. Hauling materials such as aggregate or road salt on large contracts - in the stable part of the demand picture - may be a profitable business, but for a traditional organization, the provision of trucking across the whole spectrum of the R-Class material consumer's needs is not profitable unless the trucking price can be high enough to cover the capital investment and overhead costs involved in maintaining, unused for much of the time, the capacity to deal with the sharp peaks in demand.

It is this erratic and seasonal part of the R-Class dump truck supply picture that gives the owner/operator his special advantage. The owner/operator phenomenon in the R-Class dump truck business may be traced, I believe, to the owner/operator's capacity to absorb what in another organization would be viewed as losses caused by erratic under-utilization of the equipment. The owner/operator has this capacity first of all because he derives from the business not only the net profit but the non-monetary personal satisfactions to which I have earlier alluded. He will not, therefore, necessarily consider the business a failure if his earnings do not both pay his wages as a driver and give him an acceptable return on his investment. Unlike the manager of a trucking company, he has the ability to treat the return on his investment as only one of the measures by which he judges the success of his business. As well, he can absorb or avoid

significant parts of the regular trucking company costs. He does his own maintenance and gives the driving of the truck as well as its maintenance the personal cost-saving care and attention of an owner. He also has no sales budget, no significant office expenses, no management costs, no accounting department, no building to finance, no advertising budget, no personnel department, etc. Much of that part of the trucking rate which in a trucking company's operation will go to cover overhead expenses is available to the owner/operator to help cover the excessive down-time.

I am satisfied that the relative easiness of entry into the business in terms o minimal cash and limited educational requirements, and the inherent economic advantages - in the context of a sharply cyclical and erratic demand picture - of individualized owning and operating are the essential underpinnings of the owner/operator, R licence, dump truck industry.

8. The Role of the Tractor-Trailer

I have previously mentioned the significance of the appearance of the tractor-trailer dump truck equipment and the emergence of trucking companies utilizing such equipment as major competitors of the R-Class owner/operators. In fact, I think it is correct to categorize the virtual absence of tractor-trailer dump truck equipment in the owner/operator part of the R-Class trucking industry as one of the characteristics of that industry of particular significance for my study.

It is, of course, not correct to say that one can find no tractor-trailer, owner-operated equipment. But it is apparent that as a general rule, owner/operators have not been responsive to the technological development represented by the tractor-trailer equipment. Is it because the tractor-trailer equipment is somehow inherently incompatible with the owner/operator/s business? I believe

there is some reason to think that that is true - that the nature of the tractor-trailer equipment does not fit the mold of the owner/operator's business.

One obvious difference between the tractor-trailer and the typical tandem equipment is the higher initial price and the greater overhead cost of operating the equipment. It is a piece of equipment which is more difficult to finance in the first instance and inherently less forgiving of the degree of erratic utilization characteristic of the owner/operator's business. Perhaps most important, the tractor-trailer does not have the flexibility of a tandem as far as the range of work to which it is adaptable is concerned. The equipment is designed primarily for long distance hauling of large tonnage - that part of the R-Class trucking business which is least dependent on the flexibility and short notice and short term availability so uniquely offered by the owner/operators.

What appears to be happening is that the introduction of the new equipment has provided trucking companies with the means of overcoming the owner/operator's economic advantages in the long-distance, big-tonnage part of the aggregate trucking business. It is a particularly traumatic development for the owner/operator industry since the competition cuts into what was the most profitable part of their aggregate hauling business, and it is a development that seems likely to have played a large part in motivating the owner/operators' resort to collective bargaining.

CHAPTER 3

R-CLASS OWNER/OPERATORS AS ARTHURIAN DEPENDENT CONTRACTORS

Professor Arthurs has applied the label "dependent contractor" to groups of competitors whose special economic environment subjects them inherently to a regime of exploitive potential, classically defined by the employee-employer relationship. Professor Arthurs' theme is that such groups have the same right to be provided with access to the countervailing power of collective action as employees and for the same reasons.

That owner/operators of R-Class dump trucks in Ontario are dependent contractors in that sense cannot be doubted. Like farmers and fishermen, they are individual competitors with an indispensible role in our economy who because of the nature of their business and the structure of the market in which they operate are so economically vulnerable to the whims and caprice of the purchasers of their services that in terms of their potential as victims of economic exploitation they are indistinguishable from employees.

The vulnerability of R-Class owner/operators, like that of employees, stems most immediately from the enormous difference in the significance to the owner/operator on the one hand and to the purchaser of his services on the other of the business relationship between them.

Typically, an R-Class owner/operator, like an employee, is equipped to deal with only the smallest fraction of the purchaser's needs for the service which the owner/operator provides but, also like an employee, in dealing with that small fraction of the purchaser's needs the owner/operator must commit his entire capacity. Thus, if the relationship is terminated, the purchaser will hardly notice the impact on his requirements, even if he cannot find a replacement. But the impact on the owner/operator will be serious and can be

devastating. He is out of business until he locates another purchaser, he has limited capacity to finance unexpected down-time and, by virtue of his investment in his truck or trucks, and of his limited options, he is unable to easily direct his energies and resources to other activities. When to that disparity in the relationship one adds the relative ease with which a purchaser of trucking capacity in the perennially over-crowded supply side of the R-Class dump truck market can replace any particular owner/operator as compared to the owner/operator's difficulties in the disorganized demand side of the market of finding another purchaser, one has a relationship with classic exploitive potential.

That the structural potential for exploitation has been realized in fact is also apparent. The proliferation of dump truck associations of one kind or another evidenced by the signatories to the various briefs and submissions referred to in the Sources of Information part of this Report and listed in the bibliography in Appendix G; the periodic outbursts of militant action by dump truck owner/operators starting with the 1957 violence-attended organizing drive described in the Roach Report and highlighted in the public mind by the picket line of dump trucks surrounding Queen's Park a few years ago; the repeated efforts of owner/operators to combine together to influence prices in the teeth of the combines legislation as referred to in the Report of the Rapoport Inquiry (at page 36) and confirmed by the recent "investigation" by federal officials of the Greater Ottawa Truckers' Association as noted in the Final Report of the Select Committee; the persistent political agitation about the dump truck owners' problem evidenced by the appointment of the Rapoport Inquiry and by the attention paid to the problem in the 1977 Select Committee's Final Report; and the alacrity with which the organizing opportunity offered by the 1975 amendments to the Labour Relations Act was seized by owner/operators of dump trucks as evidenced

by the number of dump truck cases dealt with by the Labour Relations Board in the intervening five years as compared to other categories of dependent contractors, are all facts that demonstrate the existence amongst R-Class owner/operators of the strong sense of powerlessness and frustration typical of workers in any exploitive environment. What analysis predicts must be the case, is obviously in fact the case.

CHAPTER 4

THE SELF-INFLICTED WOUND ARGUMENT

That the individual, R-Class owner/operator is in the business by choice and is free to leave it at any time so that he may be said to have volunteered for whatever exploitation he may find, is an answer to the claim by owner/operators for special protection which surfaced occasionally during my discussions with producers, contractors and trucking companies. If the owner/operators are suffering, is it not true that they are suffering from self-inflicted wounds? And does not the presence in the industry of a consistent over-supply of owner/operators evidence the insubstantial nature of the truckers' complaints in any event?

Arguments of this kind apply equally to employment relationships, and society has long since rejected them in the employment field in favour of collective bargaining policies. The flaw in the personal responsibility argument is, of course, that viewed from an overall economic and societal perspective, it is apparent that victims of any exploitive component of our system are not "volunteers" in any meaningful sense of the term. Exploitive systems work because they are able to offer net gains to people with limited options. The presence in such a system of any particular individual is voluntary within the constraints imposed by his personal options, but the existence of that class of competitor is effectively dictated by the economic structures of our society.

CHAPTER 5

IS COLLECTIVE BARGAINING AN APPROPRIATE REMEDY IN THE AGGREGATE-PRODUCING INDUSTRY?

1. Preface

It does not follow from the conclusion that owner/operators of R-Class dump trucks are dependent contractors in the Arthurian sense of the term and thus entitled to the advantages of collective action that unionization is the appropriate vehicle for collective action in their case. As mentioned earlier, Professor Arthurs explicitly recognizes what he calls "the need for differentiated solutions fashioned in the context of economic and sociological facts" and, as we have seen, characterized his own suggestion of unionizing dependent contractors who share a particular labour market with employees, as a short-range device through which an intelligent working solution might be tested.

Neither was the 1975 dependent contractor labour relations legislation a solution devised particularly for owner/operators of R-Class dump trucks. Indeed, there appears to be some reason to think that the Legislature had the "managers" of convenience milk stores more in mind as potential targets for the legislation, although it is not true, contrary to what is often suggested by aggregate producers and trucking companies, that there was no thought that the legislation would be applicable to owner/operators of trucks. Professor Arthurs' suggestion clearly encompassed self-employed truck drivers and the background material produced by the Government in support of Bill 111 included self-employed truck drivers in its examples of potential dependent contractors.

Particularly pertinent confirmation of Professor Arthurs' perception of the difficulty of trying to apply a "single proposal" as a general solution to the problems of more than one particular group is to be found in the failure of owner/operators of R-Class dump trucks active in the construction industry to

qualify for the solution provided by the dependent-contractor labour relations legislation, notwithstanding the widespread application of that solution to owner/operators of dump trucks in the aggregate-producing industry. The OLRB rejected the application of owner/operators in the construction industry in the Craftwood-Corevdale case (supra, page 2). (The Board's reasons for distinguishing the owner/operators in that case from those previously certified in the aggregate-producing industry are indicative of important differences in the market structure for R-Class dump truck owner/operators in the two industries - differences which I am satisfied also pertain largely between the aggregate-producing industry and the roadbuilding industry.)

The experience since 1975 with the application of the unionization solution to the R-Class owner/operators' need for collective action in the aggregate-producing industry and with the unsuccessful attempt to have recourse to the same solution for owner/operators in the construction industry provides the test-results against which the appropriateness of collective bargaining as a working solution to the need for collective action in the aggregate-producing and roadbuilding industries must be judged.

2. OLRB Decisions as the Starting Point

The actual decisions of the OLRB in which the character and dimension of the solution as applied to owner/operators of dump trucks has been determined are not a proper subject of my evaluation. I am not concerned to criticize the manner in which the dependent contractors' provisions have been applied in any particular decision. I have taken these decisions to be determinative of the way the legislated solution works in this particular context and my evaluation starts from there.

Having decided that owner/operators in the aggregate-producing industry

are dependent contractors who ought to have the benefit of some kind of collective action, the next question I propose to address is this: Is the unionization solution presented by the dependent contractor provisions and defined with particularity by the decisions of the OLRB an appropriate solution for the need for collective action in the aggregate-producing industry?

3. The Black Art and the Aggregate-Industry

The first thing to be noticed is that owner/operators in the aggregate-producing industry are not in the situation which Professor Arthurs contemplated when he suggested application of the collective bargaining system as a solution for dependent contractors. In the transport of aggregate, the owner/operators do not in any substantial sense "share a particular market with employees".[37]

For Arthurs, an important part of the justification for resort to collective bargaining for dependent contractors was the need to protect the viability of the collective bargaining regime for true employees in the circumstances where dependent contractors are engaged in providing essentially the same services as employees. As Professor Arthurs notes,[38] "union standards are as vulnerable to attack from dependent contractors as from non-union employees" and the union's inability to organize competing dependent contractors destroys its ability to control the "labour" supply and undermines its bargaining power. Furthermore, where resort to dependent contractors for its "labour" requirements is feasible for an employer, the incentives to move in that direction, including but not limited to the frustration of union organization, are attractive. Professor Arthurs describes the problem in the following passage:

> For a variety of reasons, employers may prefer to deal with dependent contractors rather than "employees". The obligation to comply with a variety of social welfare and tax statutes depends on the existence of an employment relationship, as

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[37] See Arthurs, p. 114.

[38] Ibid., p. 115.

> indeed does exposure to vicarious liability or consumer complaints. Conversely, the employer receives the benefit of increased sales or faster service by contractors whose income depends on their own exertions instead of an assured wage. A fluctuating demand for services is often more economically met by casual arrangements with a dependent contractor than by a burdensome continuing employment relationship. The dependent contractor may work for less. His individual bargaining power is substantially less than that of an organized group of employees. Capital and maintenance costs of equipment can be shifted to the dependent contractor, thereby further enhancing the bargaining power of the employer, while undermining the contractor's ability to withhold his services. Not least of the attractions of dealing with a dependent contractor is his inability to claim the protection of the Labour Relations legislation. Finally, the dependent contractor may be used to undermine the union's bargaining power, which stems from its control of the labour supply.[39]

The classic illustration of the problem cited by Arthurs is the Seven-Up case[40] where truck drivers employed in delivering the Company's products resigned from the company and immediately entered into individual contracts with the Company in which they became "distributors" for the Company's product.

Obviously, where dependent contractors compete directly with employees, a major attraction of the unionization solution from Professor Arthurs' perspective and presumably from the Legislature's perspective as well, is that it provides an effective answer to the "black art" of frustrating employment-related public policy through transforming employees into contractors by the "magic" of contractual language.[41]

I am satisfied, however, that the existence of truck drivers as dependent contractors in the aggregate-producing industry is not an instance of the application of the black art. My tracing of the history of the industry stops at 1956,

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[39] See Arthurs, p. 96.

[40] Seven-Up Bottling Co. Ltd. (1962), 62 C.L.L.C. Para. 16,227.

[41] See Arthurs, p. 96.

but in the intervening 25 years the predominance of owner/operators, as opposed to truck drivers engaged as true, common law employees, has been an integral feature of the trucking arrangements. My estimate of the reasons for producers preferring to contract their trucking appears in Chapter One, and the reader will note the similarities between that analysis and Professor Arthurs' list of "undeniable advantages" in transforming employees into contractors quoted above.

But obviously every decision in favour of contracting work as opposed to doing it oneself through hired employees will involve a similar list of considerations and not every such decision could be fairly or usefully characterized as an exercise of the "black art". What makes such a decision objectionable from a policy perspective is if it is both principally motivated by anti-union sentiment and productive of a group of dependent contractors who are for all practical purposes surrogate employees - that is to say, where it constitutes an evasion as opposed to an avoidance of an employer's responsibilities.

I am satisfied that the resort years ago to the use of owner/operators of dump trucks in the aggregate-producing industry had its roots in bona fide economic considerations and that to the extent that the classic considerations against doing work by hiring one's own employees were a factor in that development, they were not the determining factor. Avoidance of an employer's responsibilities was no doubt of some importance in the economic question, but the owning and operating of dump trucks by individuals is, as I have indicated, an economic phenomenon that transcends the aggregate-producing industry, and their appearance in that industry cannot, in my view, be characterized at all as a producer's device for evading an employer's responsibilities. The aggregate industry is not a Seven-Up case writ large, as some would have it.

Neither, as a practical matter, is the unionization solution important for the purpose of protecting the rights of true employees of the producers engaged

in direct competition with the dependent contractors. The number of employees so engaged is relative insignificant.

Furthermore, In Ontario the unionization solution does not appear to have been designed, nor is it apt, for the purpose of protecting the rights of organized employees against the inroads of competing contractors. The bargaining units to be established in Ontario are dependent contractor units. Anyone who is a true employee is excluded unless a majority of the dependent contractors involved agree to the contrary.[42]

It is apparent that the justification for the unionization solution based on the consideration of protecting the bargaining rights of true employees by allowing competing dependent contractors to be unionized does not pertain to the application of the scheme in the aggregate-producing industry.

4. Practical Problems with the Collective Bargaining Solution

Viewed from the perspective of protecting the dependent contractors themselves the unionization solution also exhibits certain serious deficiencies.

(a) The Union's Inability to Control the Labour Supply

In the first place, the collective bargaining solution has serious limitations as far as its long-term effectiveness is concerned because of the dependent-contractor union's inability in the context of the aggregate-producing industry to control the "labour supply" - i.e. to gain exclusive control of the producer's ("the employer's") trucking arrangements.

(i) The Producers' Alternatives

The problem is the variety of alternative means available to producers to transport their aggregate. The union can control only the services of a

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[42] See the Ontario Labour Relations Act, S. 6(4). Compare the corresponding B.C. Legislation which allows dependent contractors to organize only if it is appropriate to include them in an employee unit, and the Newfoundland legislation to the same effect. For further discussion, see infra, page 55.

producer's regular pool of owner/operators. The producer, however, may ship his aggregate utilizing any one of the following alternative arrangements:

(i) direct arrangements with multi-truck owner/operators or with floater-type owner/operators who are not part of the regular pool - neither of whom are eligible for union organization;[43]

(ii) transportation contracts with owner/operators obtained through a transportation broker. The owner/operators in this situation may be dependent on the transportation broker and thus subject to being organized to deal collectively with him,[44] but they cannot be organized to bargain with the producer so long as he does not regularly engage so large a proportion of their time that they may be seen to be dependent on him;[45]

(iii) transportation contracts with transportation brokers utilizing sub-contracts to owner/operators. Here, too, the owner/operators actually transporting the producer's aggregate may be dependent on their broker and may be entitled to obtain collective bargaining rights as against him, but they cannot be organized to bargain with the producer (subject to the same proviso as in (ii);

(iv) transportation contracts with trucking companies utilizing their own trucks driven by their own employees;

(v) sale of aggregate to customers (either ultimate consumers or distributors) F.O.B. pit, with customer-supplied transport

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[43] See infra, page 50.

[44] See Pasinato & Adbo Contracting, supra, page 3, footnote 6; and Indusmin, supra, page 10, footnote 14.

[45] See A. Cupido Haulage, supra page 20, footnote 22.

arrangements by,

(1) customer-owned trucks driven by customer employees;

(2) trucking companies under contract to the customer,

(3) owner/operators under contract to the customer obtained through a transportation broker or independently,

(4) owner/operators under sub-contract to transportation brokers.

It is self-evident that if a union controls only some of the ways by which an employer can readily achieve the purpose for which he hires the employees organized by the union, the union is at a substantial disadvantage in any attempt to make substantial gains for its members. If the employer is relatively indifferent as to whether or not he in fact utilizes the union's members, then any significant gain by the union in the collective bargaining process will lead inevitably to a transfer of work from its members to the other alternatives. That consideration coupled with the ineffectiveness of the strike weapon in such a situation virtually guarantees that a union in such a position will be unable to make gains that will have any substantial impact on the relative disadvantage to the employer of employing the union's members as opposed to using his alternatives. The collective bargaining regime is <u>needed</u> because individual employees are dependent on their employer, but it is <u>viable</u> only to the extent that the employer is dependent on his employees.

(ii) The Two Possible Control Strategies: Control of the Pit and Industry-wide Bargaining

There are two acknowledged union strategies - "control" strategies, I will call them - for creating or increasing that essential dependency of an employer on his employees or of neutralizing the effect of his independence. The most common is the negotiated restrictions on the employer's right to utilize his alternatives - the no contracting-out clause and its numerous variations. The

second control strategy is the organization of the suppliers of the alternative services and the development of co-ordinated collective bargaining objectives designed to, (a) achieve gains that affect the employer's alternatives at the same time as they affect his employees and, (b) through hot-cargo clauses, picket-line honouring provisions and the like, limit access to his alternatives during strike action.

In the aggregate-producing industry a producer's recourse to his other transport arrangements as an alternative to his regular pool of owner/operators will not be the last-resort tactics of the typical union-besieged employer with strong preferences for doing the work only through his own employees. The aggregate producer's alternatives are established elements of his regular business arrangements and at the best of times his preferences for the "employee" group over his other choices are marginal. In these circumstances, the viability of one or other of the two control strategies referred to above is critical for the long-term effectiveness of the collective bargaining regime as a vehicle for collective action by the regular pool of owner/operators.

(iii) Control of the Pit - the Nelson and Dufferin Experience

It is worthwhile in this context, then to examine what progress the unions who have obtained bargaining rights in respect of a producer's regular pool of owner/operators have made in negotiating restrictions on the producer's free recourse to the regular pool's competitors, or in organizing those competitors.

Particularly telling in this respect is the experience at Nelson Crushed Stone and Dufferin Aggregates - two of the largest aggregate producers in Ontario - where the regular pools of owner/operators have been unionized since 1977 and where in each case the second collective agreement was negotiated in the summer of 1980 following a lengthy strike. The Dufferin owner/operators are represented by the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery workers, Local 304, and the Nelson pool by the United Cement, Lime and Gypsum Workers International Union (the successor to the Mount Nemo Truckers Association).

The first agreements, negotiated in 1978, contained limited restrictions on contracting-out by the producers, amounting really to little more than the producer agreeing to use his best efforts to maintain the regular pool's first call on single axle or tandem trucking assignments by the producer, subject to the "immediate availability" of members of the bargaining unit with equipment "suitable to the Company's requirements".[46]

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[46] The relevant provisions of the 1978 Nelson contract read as follows:

"Re: Single Axle and Tandem Deliveries

5.04 The Company shall endeavour not to contract out to other brokers* any single axle or tandem deliveries by the Company to its customers, if such deliveries can be immediately performed by members of the bargaining unit, and if such contracting-out would lead to the lay-off of a member of the bargaining unit.

*(The word "brokers" is used in this context as a reference to other owner/operators.)

5.05 This provision is subject to such a member of the bargaining unit being willing to perform the above deliveries and possessing equipment suitable to the Company's requirement.

Re: Trailer Deliveries

5.06 Any member of the bargaining unit may purchase a trailer provided this shall in no manner be considered a guarantee of work for such member. Members of the bargaining unit with trucks other than trailers may, on agreement with the Company, deliver materials to customers requesting trailers, provided that such member will be paid at the going trailer rate for such delivery.

5.07 The Company may bring in trailers outside the bargaining unit to effect its trailer deliveries. However, where trailers belonging to members of the bargaining unit are immediately available at the going trailer rate on a given job, the Company will give preference to such trailers. Once an initial allocation for a job is made by the Company, the trailers so allocated have preference for such job."

The 1978 Dufferin contract provisions read as follows:

"4.01 The Company will establish a driver's list based on seniority. The number of drivers on such list shall not exceed 45, but if the Company proposes to increase such number it may do so after discussion with the Union representative. Seniority shall mean total length of service with the Company. It is understood that this clause does not apply to temporary hiring to cover daily fluctuation of business.

4.02 There shall be no lay-off during the life of this Agreement, it being understood that the drivers will share available work in accordance with present practice.

(Continued on following page)

An aspect of each of these contracts (to which I will refer at greater length in a different context) which is potentially misleading as to the extent of restrictions on alternate trucking assignments, is the limitations imposed on the producer's right of lay-off. The Nelson contract required the producers to "endeavour" not to contract if such contract would lead to "lay-off" of a member of the bargaining unit[47] and the Dufferin contract expressly prohibited "lay-offs".[48] These are not, however, the back-handed restrictions on the choice of alternate means of transport they appear, since it is obvious from the contract that an owner/operator whose truck is simply standing in the pit waiting for a load is not considered to be on lay-off, even though the owner/operator is not being paid for the down-time. An owner/operator on lay-off from the regular pool is one who is no longer sharing whatever work the producer is assigning to the pool. Reduction in the work assigned to the pool does not result in a lay-off as long as the producer gives each member his fair share of the work the producer is making available, however little it is.

Neither agreement restricted the producer's right to elect to transport aggregate by tractor-trailers - equipment which, as I have indicated, is predominantly operated by the owner/operators' major competitors, the trucking companies - nor did they restrict any customer's option to buy the aggregate F.O.B. the pit and arrange his own transport. In those circumstances, the limit

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[46] (Continued from page 46)

4.03 Drivers will receive available loads in accordance with the practice presently in effect.

4.04 The Company is entitled to call in truckers not on the seniority list as it sees fit provided that, sofar as practicable and the requirements of the Company's customers can be met satisfactorily, drivers on the seniority list shall have first call on loads at all times."

[47] Supra, S. 5.04.

[48] Supra, S. 4.02.

on the union's potential for negotiating significant gains for its membership is clear. If the cost of transport by the unionized regular pool goes up significantly relative to the cost of these other arrangements, the economics of the market place will dictate - the producers being largely indifferent as to who trucks the aggregate - a corresponding transfer of work either to the trucking companies' tractor-trailers or to customer-arranged trucking.

The Dufferin agreement expired December 31, 1979, and the Nelson agreement February 7, 1980. As was to be expected, high on both unions' renegotiation list were further restrictions on the producer's recourse to alternate trucking arrangements. The Canadian Brewery Workers' opening demands at Dufferin included demands for,

> "absolute priority in loading (i.e. no trailers and no pick-ups[49] unless our trucks are working constantly)."
>
> and for,
>
> "Union trailers to have absolute priority after union tandems."

The Gypsum Workers asked Nelson to replace the original 5.04 and 5.07 clauses[50] with the following:

> "5.04 The Company shall not contract out of the bargaining unit any hauling or transporting of any material from the quarry except with the prior written consent of the Union. In addition, the Company shall not enter into any arrangements directly with customers or persons acting for customers to haul or transport any materials taken from the quarry save with the prior written consent in writing of the Union. In the event of a breach of this provision the Company shall compensate any employees adversely effected in an amount equivalent to the rates which would otherwise have been payable to and earned by them in the hauling of such material."
>
> 5.07 The Company will only use trailers owned by members of the bargaining unit except as may otherwise be agreed to in writing with the Union."

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[49] That is to say, no customer-arranged trucking.

[50] Supra.

In addition, the Gypsum Workers sought an amendment to the definition of the bargaining unit at Nelson to add the following:

> ". . . all other persons who engage, or whom from time to time are engaged, in the hauling or transporting of any material at or out of the Company's Quarry located in Burlington shall be covered and governed by this agreement."

After strikes that lasted almost three months in both places (involving, of course a range of issues but prominent amongst which was this push for control of all trucking in the pit) there were no changes to the restrictions as originally agreed to at Dufferin and only nominal changes at Nelson.[51]

An examination of the other collective agreements made available to the Commission confirms that with one exception - an exception which I am satisfied is anomalous - the unions have so far been unsuccessful in negotiating significant contractual restraints on the producers' access to alternate trucking arrangements.

This experience with the unions' attempt to corral the "labour supply" by contractual restrictions is no more than what one might have expected, given the unions' bargaining strength on this issue. Unlike most industrial situations, the alternative sources of "labour" in the aggregate-producing industry are thriving parts of the regular transport arrangements - as integral to the producer's business as the union members. To ask a producer to give up these other trucking arrangements is to ask him to reorganize his business to his substantial economic disadvantage, at the cost of abandoning viable and long-standing business relationships with other people in circumstances where he must know that those very relationships are what give him ultimately the upper hand in dealing with the union. A union that does not control the employer's labour supply simply does

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[51] At Nelson, the 1980 changes consisted of adding to the marginal headings of clauses 5.04 and 5.06 (see footnote 46, supra) the words: "(Where the Company pays the trucker for hauling)" and deleting the last sentence of Article 5.06.

not have the leverage to achieve a concession of that significance.

I am satisfied that there is no reason to expect that through negotiation with individual producers the unions will prove capable of removing the obstacle to effective collective bargaining represented by the producers' lack of dependence on their members.

(iv) Industry-wide Bargaining

What, then, are their prospects of organizing the producers' alternative sources of trucking - for moving to the second, control strategy?

What is required if the unions are to neutralize the effect of the individual producer's range of trucking options is for each of the options to be subjected to the collective bargaining regime. This means organizing the truck-driver employees of the trucking companies, the owner/operators dependent on transportation brokers and the employee-drivers of customer-owned trucks, and then co-ordinating the collective bargaining strategy on an industry-wide basis.

This list of bargaining targets does not include the floater-type owner/operators or the multi-truck owner/operators who are a regular part of the aggregate transport arrangements but who are not eligible for unionization - the latter because they are not "dependent" on any particular producer or broker[52] and the former because being employers as well as truck-drivers they have been held not to be covered by the dependent contractor provisions of the Ontario Act notwithstanding their dependency.[53] The implications of this gap in the coverage of the unionization scheme for the general question of its appropriateness are significant and will be discussed in due course. But on the question of the viability of industry-wide organization as an answer to the producers' lack of compelling dependence on their unionized, regular pools of owner/operators, I do not think this gap can be said to represent

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[52] See Craftwood and Coreydale, supra, page 2, footnote 2.

[53] See Canada Crushed Stone, [1977], O.L.R.B. Rep. 806.

in itself a serious obstacle to the industry-wide strategy. Were the unions able to organize those units of the industry transport which are eligible and to successfully co-ordinate bargaining with those units on an industry-wide basis, it seems likely that the unions would then have the strength to make the utilization of multi-truck owner/operators and floaters conditional on the application of the industry terms.

There are, however, a number of serious obstacles to a successful industry-wide strategy. In the first place, the truck drivers who must be organized in such an effort are not the homogenous group with common interests and common bargaining agendas that one finds, for instance, in the construction industry trades - the model of industry-wide union strategy which would parallel most closely the situation in the aggregate-producing industry. The truck drivers who must be organized if such a strategy is to be successful encompass in the aggregate industry both true employees (in the classical sense of the term)[54] and owner/operators, and neither the interests nor the bargaining agendas of those two groups have much in common. Indeed, in a fundamental sense their interests may be characterized as antithetical since they are competitors for the work of transporting aggregate. To the extent that owner/operators are successful as a group it is at the expense of trucking companies or customer-owned trucking and thus at the expense of the jobs of employed truck drivers. And it is not the case that the two groups are really fungible - that is, that a truck driver can move readily from the ranks of the employed to the ranks of the owner/operators as the locus of the transport of aggregate shifts. There will no doubt be some proportion of truck drivers who are constitutionally capable of switching from employed status to owner/operator status, but my strong impression is that for the most part owner/operators are a breed apart.

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[54] Employees of the trucking companies and customers.

Owner/operators are like employees in their dependency and potential for exploitation - that is what makes them Arthurian dependent contractors - but there are few other similarities. Most of the owner/operators indicated in their evidence before the Labour Relations Officer enquiring into the applications for certification that they became owner/operators because they were not safisfied with previous employment and because of the special financial opportunities they thought owning and driving a truck offered over and above employment. By and large, their character traits and personal ideology appear to be clearly more attuned to those of a businessman than to those of an employee. Unlike the situations where employers have converted employees to contractors through Professor Arthurs' "black art" of magical contract devices, it is by a wide margin not as easy in the aggregate industry to be an owner/operator of a dump truck as it is to be an employed driver of a dump truck. Owner/operators have to buy and finance their own truck and its ultimate replacement. They have to do or arrange for their own maintenance, suffer the loss of income represented by any down-time (and when they are sick find their own replacement driver or suffer the down-time), and until they can make their way into a particular producer's regular pool they must really hustle to find work for their truck, and when they fail to find enough work or suffer too much down-time their remedy is personal bankruptcy, not an unemployment insurance cheque. In my judgment, the difference in character traits and personal ideology between an employed truck driver and an owner/operator is not unlike the difference in such matters between a salesclerk who is content with a selling career at Simpsons or Eatons and the person who opens his or her own dress shop or between an electrician employed on, say, the Ontario Hydro staff and an electrician running his or her own, one-truck electrical contracting business. Owner/operators are - have to be - people with strong entrepreneurial drives.

I know the OLRB has been disparaging of the entrepreneurial character of owner/operators in the regular pools for which it has certified bargaining agents. But the cases suggest that the Board may have had some difficulty in remaining wholly objective in its view of the entrepreneurial nature of the activity in those cases. The Board has characterized the requirement in the dependent contractor provisions of the Act that, for the provisions to apply, the relationship between the contractor and the person for whom he performs his work or services must more closely resemble the relationship of an employee than of an independent contractor, as in effect a formula for distinguishing between a true entrepreneur and a pseudo-entrepeneur. That distinction appears to have effectively replaced the distinction between employees and independent contractors as the litmus test for the applicability of the Labour Relations Act.[55] It is true that the Board

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[55] See Superior Sand, Gravel and Supplies, supra, page 9, footnote 13. See in particular paragraphs 19, 21, 33 and 35 of that Report. In paragraph 21, Professor D.D. Carter, Chairman of the Board and speaking for the majority in this case, outlined the Board's policy in the following terms:

> "Our interpretation and application of the dependent contractor provisions, therefore, will reflect our concern that the true business entrepreneur, or independent contractor, should not be included within the concept of a dependent contractor."

See also Consolidated Sand and Gravel, [1978] O.L.R.B. Rep. 264, and the reference at paragraph 22 of that decision to the Superior Sand and Gravel case and to paragraph 19 of Superior Sand and Gravel, the first sentence of which reads as follows: "In cases such as this one the Board must distinguish the workman from the true entrepreneur."

See as well Blue Line Taxi, [1979] in O.L.R.B. Rep. 1056.

See as well A. Cupido Haulage, supra, page 20, footnote 22. See in particular paragraph 18 characterizing the nature of the Board's task in a "dependent contractor" inquiry in the terms set out in the Superior Sand, Gravel and Supplies case and identifying the Board's task as distinguishing the workman from the true entrepreneur.

See as well the decision of the Ontario Labour Relations Board in Craftwood and Coreydale, supra, page 2, footnote 2.

See also Nelson Crushed Stone, supra, page 3, footnote 6 at 111.

continues to consider a number of different individual factors, but it is apparent that what they are trying to "capture" with those factors is the distinction between a true entrepreneur and a workman.

Having thus characterized the essential question, there is a natural tendency to make the concept of pseudo-entrepreneurialship comport with the facts in any case in which policy considerations would appear to justify the application of the Act. In the context of an application for certification by dump truck owner/operators in the aggregate-producing industry where the person providing the service does so with his own hands and without employing others and has for those reasons the look of an employee, and where, in the earlier cases particularly, there is substantial evidence of employer-like control, the Board, in applying the entrepreneurial test, has been led to place great reliance on the one fact that regular-pool owner/operators work almost exclusively for one "customer", as proof of the absence of a true entrepreneurial spirit and as justification for the application of the dependent contractor provisions.

The Board's analyses in these cases points up in my view the inherent limitations of adopting <u>any</u> "status" characterization as the indicator for applying or not applying the collective bargaining regime. One-customer situations are not <u>per se</u> inconsistent with entrepreneurial activity - indeed in some circumstances they may well evidence a particularly successful application of entrepreneurial drives. Arguably, that <u>is</u> the case with members of a producer's regular pool. It would appear that the distinction between entrepreneurs and workmen or pseudo-entrepreneurs offers problems in rational application that are indeed rather similar to the former distinction between independent contractors and employees.

I am satisfied in any event that a successful dump truck owner/operator must be a person whose entrepreneurial drives are sufficiently strong as to make entry

into the business by the average employed truck driver unlikely. Accordingly, as I have indicated, any industry-wide collective bargaining strategy must confront and resolve the essentially competitive nature of the relationship in the aggregate transport business between employed truck drivers and owner/operators. Whether a strategy that would accommodate the inherent conflict of interest between the two groups is possible seems at least problematic.

It is of interest in this connection to take note again of the provision in the Act requiring the Board to deem appropriate for collective bargaining only a unit consisting solely of dependent contractors unless a majority of the contractors in question should consent to being included with true employees.[56] As previously mentioned, the B.C. legislation has effectively confined the unionization of dependent contractors to situations where it is appropriate that they be added to an existing bargaining unit of true employees and has thereby limited the potential for conflict between the two groups. A group of organized employees who perceived such a conflict would presumably not be interested in having the dependent contractors added to their unit and because the legislation requires a mixed unit, the B.C. Board will have an opportunity to assess the appropriateness of such a unit in terms of the affinity and interest between the two groups. The Newfoundland legislation which also requires a mixed unit makes it an express condition of adding dependent contractors to a unit of employees that reasonable procedures have been developed for integrating the two groups (see Labour Relations Act, 1977, S.N., 1977, c 64, sections 1(m) and 40). By contrast, the Ontario legislation accommodates the likelihood of conflict between the two groups by structurally facilitating bargaining competition.

The essential difference in the point of view of owner/operators from that of employed drivers may also be seen in the organizing history of the owner/operators. The resort to the collective bargaining system by owner/operators

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[56] Section 6(4).

seems to have been a last choice following years of focussing on other means of collective action such as trade associations and co-operatives. The resort to unionization has clearly been a case of adapting to what is possible having regard to the laws against combinations in restraint of trade outside the collective bargaining regime.[57]

The potential for industry-wide strategy is also substantially diminished by the number of unions that would have to be involved in co-ordinating that strategy. There are several distinct unions[58] actively competing in the organization of owner/operators of dump trucks and to that number would have to be added the unions representing the employed truck drivers of trucking companies and of at least the major aggregate consumers.

The large number of the potential employers of dump truck services in the transport of aggregate, the open-ended nature of the employer list - particularly on the customer side - and the typically erratic, short-duration employment of such services by customers are further substantial obstacles to organizing effectively on an industry-wide basis.

(v) Conclusion

In view of all of the foregoing, it seems to me at least unlikely that the problem for effective application of the collective bargaining regime represented by the producers' lack of compelling dependency on the regular pools of owner/operators can be solved by resort to an industry-wide strategy. It, therefore, seems most probable that the effectiveness of the collective bargaining regime

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[57] For a description of the dump truck owner/operators' brushes with the federal combines law over the years, see Chapter V of the Report of the Rapoport Inquiry. See on the same note the Final Report of the Select Committee on Highway Transportation of Goods, Part VI, Chapter 1, Section 1.4.4, dealing with associations and rates.

[58] (a) Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304.
(b) Greater Northern Ontario Trucking Association.
(c) Various affiliated locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
(d) United Cement, Lime and Gypsum Workers International Union.

as a vehicle for collective action for owner/operators of dump trucks in the aggregate-producing industry will continue to be confined by the rather serious limitation which that problem presents.

(b) Deficiencies in the Coverage

A second major deficiency in unionization as a vehicle for collective action by owner/operators of dump trucks in the aggregate-producing industry is the fragmented and largely fortuitous nature of the coverage. Owner/operators of dump trucks are Arthurian dependent contractors in need of the protection of collective action whether or not they have had the good fortune to find a steady customer. In fact, those who do not enjoy a major relationship with any one customer - those who in the aggregate industry are referred to as "floaters" -- are clearly far more susceptible to exploitation than are those in the regular pools.

It is not yet clear from the decisions of the OLRB what minimum percentage of an owner/operator's income must be derived from one customer before the Board will find a sufficient degree of dependency to warrant the application of the dependent contractor provisions. In the cases where certification has been granted the percentages were typically 80% or more. But in Superior Sand, Gravel and Supplies, 1978, the Board appears to have included in the bargaining unit at least one owner/operator who was deriving only 25% of his income from the Respondent Company. And in Craftwood and Coreydale, where the Board rejected (subject to some unidentified possible exceptions) the concept of dependency on more than one customer satisfying the requirements of the Act, and dismissed an application for certification where the percentage of the income of the applicants derived from the actual Respondent was in the order of 5 to 10%, the Board expressly left open the possibility of a successful application wherever a "substantial portion"

of income is derived from a single source.[59]

Whatever the eventual outcome on this issue, it is apparent that deriving some substantial percentage of one's income from one source will continue to be a condition of access to the collective bargaining regime and, accordingly, some significant part of the group of owner/operators which needs the protection of collective action will continue to be effectively excluded from the collective bargaining remedy.

Furthermore, as illustrated by the individual cases examined in the Craftwood and Coreydale decision, the scheme even where it is applied will have what can only be described as a fitful application. For example, the detailed statement of income for one of the applicants for six months as set out in the Craftwood and Coreydale decision (at page 1621) reads as follows:

Company	Amount	% Total Income
Acri Construction	$ 9,204.75	33.2
Lou Savini	3,948.50	14.2
Armbro Construction	2,280.00	8.2
Warren Bitulithic Ltd.	722.62	2.6
Farry Excavating	143.00	0.5
Alcan-Colony	660.00	2.4
Costa Trucking	440.00	1.6
Craftwood Construction	1,848.00	6.7
Petrex	69.00	0.2
Four Valleys Excavating	1,265.00	4.6
Will Thorn Construction	4,983.00	18.0
San Joe Excavating	2,156.00	7.8
12 Companies	$27,719.87	100.00

[59] Craftwood and Coreydale, supra, page 2, footnote 2. Read p. 1639 in conjunction with pages 1620-1622 and 1627-28.

The individual owner/operator whose statement that is, might conceivably have been included in a bargaining unit at Acri Construction (where he derived 33.2% of his income during the period of time selected as determinative of his status) but would not be eligible for a bargaining unit when working for Lou Savini (14.2%) or Will Thorn Construction (18.0%). There might, of course, be bargaining units of owner/operators at Lou Savini's or Will Thorn's composed of truckers who worked somewhat more regularily at those locations. However, this individual would not be included in such units - until, of course, he increased the proportion of his work at those locations above the minimum percentage, whatever that turns out to bé.

The coverage also does not extend in Ontario to multi-truck owner/operators. This was established by the Board in Superior Sand, Gravel and Supplies,[60] on the basis that the employment of others - the earning of profits from the labour of others - is inconsistent with the status of a workman and a sure-fire indication of true entrepreneurship. It follows from that decision that the inclusion of multi-truck owner/operators in an owner/operator organization disqualifies that organization from recognition as a trade union for purposes of the Labour Relations Act.

The upshot is that not only are multi-truck owner/operators excluded from any certified bargaining unit but if owner/operators are to have recourse to the collective bargaining regime they must purge their organizations of all multi-truck owner/operators.

There is no doubt that the majority of dump-truck owner/operators own one truck, but the persons who own two or three trucks, one of which they drive, and who typically employ friends or relatives to drive the others, traditionally

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[60] Supra, page 9, footnote 13. See also Crawford Sand and Gravel, [1980] O.L.R.B. Rep. 309. But cf. Fownes Construction, [1974] 1 C.L.R.B.R. 510.

represent a not insubstantial percentage - perhaps 20% - of the total group[61] and they are clearly an integral part of the R-Class dump-truck owner/operator phenomenon. Indeed, for obvious reasons, they might be expected to contain within their ranks a disproportionate share of the group's vitality and strength. They are certainly as open to exploitation as the single-truck owner/operators - arguably more so - and clearly qualify as dependent contractors in the generic, Arthurian sense of the term.

A scheme for collective action by owner/operators that excludes the multi-truck owner/operators is an artificial creation that, in my opinion, is unlikely to accord to the reality of the group's organizational needs.

The collective bargaining scheme, however, is not only of limited effectiveness with limited and merely fortuitous coverage, it is also in a number of respects, in my opinion, positively harmful to the interests of owner/operators.

(c) The Exclusion of the Multi-Truck Owner/Operator

I have already alluded to the organizational problems presented by the scheme's failure to include multi-truck owner/operators. But that aspect of its application is not only divisive in an organizational sense, it also represents, in my opinion, a substantial interference with an essential part of the source of the owner/operator phenomenon - the entrepreneurial opportunity for growth which owning and operating a truck has traditionally offered. It is, it appears, a fact that a large proportion of the trucking companies at work in the aggregate-producing and road-building and construction industries trace their origins to some one individual owning and operating one truck. The purchase of a second truck and then a third has been the traditional pattern of growth for the businessmen in the group. Furthermore, the owning and operating of two or three trucks as a

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[61] As indicated by the 1.3 average number of trucks for each owner/operator on the MTC records. See p. 22, supra.

static arrangement by people who, while not motivated to leave the operating life, are capable of running more than the truck they drive and are anxious to increase their income or to introduce their sons to the business, etc., is also a traditional part of the dump-truck owner/operator culture.

The exclusion of multi-truck owner/operators from the collective bargaining unit and from the truckers' organizations has the effect of making the acquisition of a second truck a difficult and traumatic affair, and while it can be expected - as with any legislation that runs cross-grain to the natural order of things - that the wit of man will not prove incapable of devising evasion mechanisms, this aspect of the application of the legislation must be regarded as particularly unfortunate.

(d) The Consequences of Leaving Eligibility for Union Protection in the Hands of the Producers

Another significant source of positive harm to truckers in this legislation is the fact that in the long term it effectively leaves the eligibility for the protection of collective bargaining of any particular owner/operator to the discretion of the "employer" and thus motivates the owner/operators' customers to limit the business they give to any particular owner/operator to whatever tonnage they can be sure will not take them into a dependency relationship with that trucker. Because of the varied structure and perenially overcrowded nature of the supply side of the R-Class dump truck industry, there is no reason to think that such an objective could not be achieved with marginal inconvenience and relatively little extra administrative cost. The organization of one's transport needs, before the event, with the avoidance of union involvement as a primary objective would not appear to constitute a breach of any of the unfair practice provisions of the Act, as there is no bar on activity which seeks to avoid a person becoming one's employee.

Thus, to the extent that the unions are effective in representing their members, to that extent it seems likely that the owner/operators not yet within the fold will find that the application of the dependent contractor's provision of the Act to their industry will have had the practical result for them of making the hustle for work even more difficult than it has been in the past.

(e) The Anti-Collective Nature of the Collective Bargaining Solution

The legislation's failure to accommodate an all-owner/operators' unit also gives to the collective bargaining process in this industry a selective and perso aspect that is inconsistent with the principle of collective action when viewed from the perspective of the entire group. The criteria of eligibility of owner/operators for inclusion in the collective bargaining process is not simply the "employer's" utilization of the "employee's" services - as is the case in a regular employment context (for example, the utilization of the services of pipefitters by a construction contractor). Rather, it is the utilization of such services beyond a certain point - to a degree which creates a dependency relationship. And because the existence or non-existence of a dependency relationship is a fact that is personal to each owner/operator and ascertainable only by an extensive examination of each individual's business, membership in each bargaining unit is perforce a personal rather than a job attribute. Visit a union construction site and you will know that anyone engaged by a union contractor to perform pipefitting work is by virtue of the nature of the work he is doing a member of the pipefitters' bargaining unit and entitled to all the rights of every other person engaged by the contractor to perform pipefitting work on that site. Visit a unionized aggregate pit, on the other hand, and you will be unable to tell whether a person engaged by the producer to haul aggregate is a member of the owner/operators' bargaining unit at that site and entitled to the rights of a member, unless you ask him his name. Only with his name can you

find out if he is one of those who has been determined to be the owner of a single truck in a dependent relationship with the producer.

This "personal" feature of the collective bargaining rights established under the dependent contractor provisions in the aggregate-producing industry is reflected in the incorporation in bargaining unit descriptions to be found in collective agreements negotiated under these provisions, of lists of named individuals as an essential part of the definition - a practice unknown in a traditional collective bargaining setting.

A typical example is the agreement dated June, 1980 between TCG Materials Limited and Greater Northern Ontario Trucking Association. The recognition clauses in that agreement read as follows:

> 1.01 The employer recognizes the Union as the sole collective bargaining agency for all dependent contractors who are owner/operators of trucks engaged by the employer at its Fonthill pit in the town of Pelham, Ontario and which dependent contractors are more particularly outlined in Appendix B hereto.
>
> 1.02 For the purposes of this agreement, the term "employee" shall mean those truckers whom the employer has recognized as being dependent contractors within the meaning of Section 1(1)(ga) of the Labour Relations Act and are set out in Appendix B hereto, and as such other owner/operators of trucks who may be found by the Ontario Labour Relations Board to be such dependent contractors.

The fact is that the application of the dependent contractor provisions in the aggregate-producing industry has created a preferred status amongst owner/operators based on personal as opposed to job attributes and has generated collective action with a paradoxically parochial and selfish focus.

For example, in the collective bargaining agreements to be found in the aggregate-producing industry the provision requiring that work assigned to single-axle or tandem equipment by the producer be assigned first to bargaining-unit members is effectively a provision directed against the employment of other

owner/operators. For the reasons already explored, the owner/operator unions are probably incapable of limiting assignment of work to the tractor-trailers operated by trucking companies or of preventing pick-ups by customer-arranged trucking. Therefore, with respect at least to the assignment of work, the power of the collective action authorized by the dependent contractor provisions has been effectively exercised primarily against the interest of other owner/operators.

The effect of the personal nature of the rights may also be seen in the emergence of collective bargaining provisions which give to the union a veto over the entry of newcomers to the bargaining unit and an interest in limiting the size of that unit. Typical of such provisions is Article 6.03 of the TCG agreement referred to above which reads as follows:

> "There will be no lay-off of the employees listed in Appendix B attached to this agreement during the life of the agreement, it being understood that the employees will share available work in accordance with the present practice. It is further agreed that this list may be amended on agreement of the parties." (emphasis added)

The operating principle is that everyone in the unit shares equally the work assigned to the regular pool. The result is that the work made available to each bargaining-unit member varies proportionately with the total tonnage assigned to the regular pool as a group. Accordingly, the smaller the number of members in the bargaining unit the more work there is for each member, and the larger the number of members the greater the amount of unpaid down-time for each. It follows, therefore, that new members are admitted to the unit at the direct expense - either immediate or prospective - of the existing members. In those circumstances, it is reasonable to anticipate that new members will rarely be welcome. It is apparent that the application of the legislation to these circumstances has created a situation where it is in the union's interest to limit the size of the bargaining unit!

The union's power to restrict the number of members in the bargaining unit is

also not limited by any competing interest of the producer. Because producers are able without difficulty to assign to other truckers work that is not within the capacity of the bargaining-unit owner/operators, the producer has no operational reason for opposing the union's wishes in this respect and from the industrial relations perspective it is in his interest to keep the bargaining unit as small as possible.

An interesting indication of the personal nature of the preferred status of members of the owner/operator bargaining units as compared to that of other dump truck owner/operators is the perception of that status as a marketable quantity. The ability of a member of a collective bargaining unit to sell his membership in the bargaining unit with the sale of his truck would in the circumstances created by the dependent contractor provisions greatly enhance the value of his business and would constitute a substantial benefit for all members of the unit. Since the producer has an interest in controlling who becomes a member of his regular pool, any grant of such transfer rights would presumably remain subject to some right of prior approval by the employer, but subject to such a proviso there is nothing in the relationship between the union and the producer that militates seriously against the ultimate negotiation of transfer rights. The demand for such rights has already appeared on the unions' bargaining agendas.[62]

It is not my view that the owner/operator unions are to be criticized for the inward-looking parochial aspect of the union activity in the aggregate-producing industry. These aspects are, I believe, unavoidable consequences of the application of the dependent contractor provisions in the circumstances of

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[62] Amongst the list of new proposals contained in the proposed amendments to the collective agreement between Willroy Mines Limited and United Cement, Lime and Gypsum Workers International Union AFL-CIO-CLC, Local 566, there appeared the following item: "If an employee sells his truck the company shall hire the person who purchased the truck . . ."

that industry, and I am primarily interested in them for what they indicate about the innate appropriateness of that application. A scheme of collective action for a group of dependent contractors that results in only some individual members of that group being able to qualify for the benefits of the collective action and which channels the application of the countervailing power derived from the collective action substantially to the pursuit of personal interests which can only be secured primarily at the expense of the rest of the group, is surely not a scheme that would commend itself to anyone who had actually set out to design a general solution to the problem of exploitation of dump truck owner/operators in the aggregate-producing industry - particularly not, when in the long run the selection of the membership of the preferred group is, as a practical matter, in the producers' control.

(f) The Perverse Nature of the Definition of Dependency

In my opinion, one of the most critical deficiencies in the dependent contractor provisions relative to their application in the aggregate-producing industry is the fact that their availability is triggered by a definition of dependency that does not accord with the true root of exploitation in the industry. Dump truck owner/operators in the aggregate producing industry (as elsewhere) are Arthurian dependent contractors for reasons (previously identified) which have nothing to do with whether or not they have a steady customer. The choice of the existence of a steady customer as the condition for authorizing resort to collective action is understandable from the point of view of the collective bargaining regime since the structure of that regime premises a relationship between employees and an employer, but it is a purely arbitrary and indeed arguably a perverse choice from the point of view of solving the potential for exploitation of dump truck owner/operators in this industry.

The "choice" of the existence of a steady customer as the condition for

exercising collective bargaining rights in the aggregate-producing industry was not, of course, a choice that anyone consciously made with explicit reference to that industry. It is the institutional consequence of applying collective bargaining legislation devised as a general remedy for Arthurian dependent contractors to this specific industry.

What has been demonstrated, in my opinion, however, is that the owner/operators' need for collective action is so structured in the aggregate-producing industry as not to be amenable to the general solution. This is a need that does appear to require - to use again Professor Arthurs' felicitous phrase - a differentiated solution fashioned in the context of its own economic and sociological facts.[63]

(g) The Problem of the Shifting Status

I would be remiss in this analysis of the problems with the application of the dependent contractor provisions in the aggregate-producing industry were I not to mention the problems posed by the shifting nature of the employee status which pertains when the legislation's definition of dependent contractor is applied in this industry.

The status of any particular owner/operator as an "employee" for purposes of the Labour Relations Act depends under the current regime in the aggregate-producing industry on two facts: one, the amount of money paid by the producer (against whom the rights of an employee under the Act are sought to be enforced) to that owner/operator for the tonnage of aggregate haulage assigned to him by the producer in the period of time to which the OLRB will have reference for qualification purposes; and two, the total amount of money grossed by that owner/operator from all other sources for work done by him during the same period.

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[63] See Arthurs, p. 114.

It is the relationship between these two amounts which determines whether an owner/operator is an employee with respect to any particular producer at any particular point of time.

The difficulty which I am now addressing with this definition is that it in effect makes the employee status of any particular owner/operator at any material moment, dependent on a snap shot at that point of time of what is in fact an endless, personal parade of largely fortuitous events.

The problems of principle which such a definition raise are obviously serious. Most importantly, it is a definition which leaves each individual owner/operator's entitlement to the rights of a member of a bargaining unit and to the protection of the Labour Relations Act, and each producer's rights and obligations under the Act relative to any particular owner/operator, in a permanent state of uncertainty and flux - dependent on the fortuitously-determined make-up of the individual owner/operator's own parade of business activities during what is determined (when the issue arises) to be the relevant period.

It is not in my view an acceptable situation to have employees and employers routinely from time to time subject to the obligations and protections of the Labour Relations Act or not subject to such obligations and protections depending on a march of events over which neither can have firm control and as to the results of which neither can predict. It is impossible to know in advance when the issue will arise and therefore impossible to know what particular segment of the passing parade will be determinative of the status.

It is true that in the aggregate-producing industry the problem in principle is largely avoided in practice because of the very high proportion of their total work regular-pool owner/operators routinely derive from one specific producer -

80% or better in most of the cases considered by the OLRB. The variation in the income sources of owner/operators in the regular pool would have to be extremely atypical before it would begin to jeopardize their employee status, since the test: the deriving of "a substantial proportion of their income" from the putative "employer", may well be met by a 30 or 40% figure.[64] Furthermore, with members of the regular pools, the possibility of drifting in and out of status during the term of the agreement is often blocked by the common device of defining the bargaining unit in part by express designation of individual members by their name (or its equivalent). After such a designation, the named individual will remain a member of the unit even, presumably, if he changes his historical pattern and in fact starts to derive only a non-substantial portion of his income from that producer.

But even in the aggregate-producing industry there will always be truckers on the margin of the regular pools[65] so that the problem in principle may also be a serious problem in practice - at least for organizing purposes - even in that industry. A trucker who is finally determined by the OLRB not to have status is a trucker who is unprotected by the Act from subsequent discrimination based on his participation in the organizing effort.[66] Furthermore, the device of designating membership in a bargaining unit by naming individuals, presents its own unique limitations and problems some of which we have already discussed. The collective-bargaining agreement protection also does not extend past the expiration of the agreement so the problem of the shifting status may come to

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[64] See Craftwood and Coreydale, reading the final conclusion at page 1639 with the financial statement evidence the Board was considering in that case as set out at pp. 1620, 1621, 1622, 1627 and 1628.

[65] See the 25% trucker in Superior Sand, Gravel and Supplies, supra, page 9, footnote 13.

[66] Consolidated Sand and Gravel, supra, page 53, footnote 55, para. 5.

the fore in any strike situation notwithstanding name designations in the agreement.

That the problem of the shifting status is more pervasive and of greater significance in other areas of dump truck use, such as in the roadbuilding and construction industries, becomes apparent when one considers its implications in the context of the typical multi-customer, business patterns described in the Craftwood and Coreydale case as discussed earlier.[67]

(h) The Black Art Aspect of the Collective Bargaining Solution

Finally and paradoxically, there is I believe an unfortunate "black art" aspect to the application of the collective bargaining regime to the owner/operators in the aggregate-producing industry which one could argue may make such application as objectionable on public policy grounds in its own way as are the contractual schemes of employers bent on evading their obligations for which Professor Arthurs originally coined the phrase. It is apparent to me from what I have heard and seen in the course of my study that neither the producers nor the owner/operators themselves view owner/operators as in any sense employees of the producers. A glance at the historical development of the organization of owner/operators demonstrates that they came to the union movement as a move of last resort and that historically they have resisted being categorized as employees.[67a] They obviously pride themselves on the distinction between themselves and employed truck drivers and for the most part are individualists with strong entrepreneurial drives. The producers and trucking companies, having had a long and intimate experience with the utilization of the services of owner/operators have a keen appreciation of this independent quality, and it is an important source of the outrage felt by producers and trucking companies at the application of the Labour Relations Act to

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[67] See page 58, supra.

[67a] See page 56, footnote 57, supra.

the aggregate-producing industry that they know that the owner/operators whose services they utilize are not their employees in any commonly understood sense of the term. Being told by the Labour Relations Board that these individuals are their employees when they know it is not true is a significant part of what infuriates them about this system.

Of course, the Labour Relations Board is not deciding that the owner/operators are employees in the traditional sense of the term. The legislation has simply used the device of deeming a dependent contractor to be an employee as a means of giving dependent contractors entry to the collective bargaining regime. It is no more than a convenient device for invoking existing legislation (and existing jurisprudential experience with that legislation) in aid of this new situation.

It is a logical legislative device - assuming it were appropriate in other respects - but in my opinion it presents serious problems in human terms. By labelling the dependent contractor owner/operators "employees", one does not only invoke the legislation, one also invokes deeply rooted perceptions and feelings and conditioned reflexes about the traditional socio-economic institution of employment. And the perceptions, feelings and reflexes thus invoked then collide with the often antithetical perceptions, feelings and reflexes about owner/operators.

For the most part, owner/operators, while clearly Arthurian dependent contractors, are not - in any naturally understood sense of the word - employees, and for the Labour Relations Act to call them employees and to require the producers in the aggregate-producing industry to deal with them as employees (and to require the owner/operators to deal with the producers as employers) is, I think, really to be seen to be dealing in some form of legislative black art.

This mislabelling leads to a bargaining process that is of a grudging, highly

technical and formalistic nature and to destructive aberrations such as those illustrated by the union demand for statutory holidays for their trucks.

If the idea of the unionized owner/operator taking his truck on holiday with him was mentioned to me once by producers as the ultimate absurdity, it must have been referred to seven or eight times in the course of my meetings. The picture of a dump truck holidaying on some Florida beach, which is what the union's demand in this respect evoked for producers, is a particularly illuminating illustration of what happens when for administrative convenience one arbitrarily applies labels with their own cultural and social content to situations to which the content does not naturally refer. The demand for payment of the trucks' down-time during a statutory holiday is not an absurd suggestion at all, viewed objectively and working on the premise that a paid statutory holiday for the operator is itself a reasonable demand. The only way to achieve a holiday that is not taken at the owner/operator's expense is to have the producer pay for the trucks' down-time. And, of course, in a traditional employment situation, employers have always paid for the down-time of the equipment in the sense that when a plant closes for a holiday, the equipment stands idle at the employer's expense. Viewed in those terms, the demand is not at all radical or bizarre. But if the idea that this is now an employment relationship hasn't "taken" in any substantial sense, then the demand is bound to be seen as ridiculous. It would be absurd, for example, for a businessman to attempt to negotiate with a customer, payment for services not delivered, in order that the businessman could take a day off without loss of income. The businessman's approach would be to seek a high enough return on the services he does provide so that he can afford to take holidays when he wants to.

It is not perhaps inconceivable that in the absence of the employment construct, regular-pool owner/operators in the aggregate-producing industry might

nevertheless want at some stage to put on their agenda for discussion with the producers an arrangement whereby they could take a day off without losing the income represented by the day's employment of the truck. It is the fact that the demand for such an arrangement did not arise naturally out of the true relationship between owner/operators and producers but was instead triggered by the application of the artificial label which makes it an alien demand disruptive of the bargaining relationship.

In my view, therefore, even if one were satisfied that the concepts and structure of the collective bargaining regime constituted an effective and desirable scheme for extending the benefits of collective action to owner/operators in the aggregate-producing industry, it would still not be constructive to do so by an artificial application of the Labour Relations Act. If the collective bargaining concepts and structures were otherwise workable, then they should be reproduced in separate legislation adapted in terms of language and concepts to the particularly unique characteristics of that institution in that industry.

3. The Collective Bargaining Solution As a Vehicle for Unfair Competition

In this assessment of the application of the dependent contractor provisions I also cannot overlook the concern that was at the forefront of the submissions to me by representatives of the trucking companies that the application of collective bargaining arrangements to owner/operators in the aggregate-producing industry was subjecting the trucking companies to unfair competition for the work of hauling aggregate entirely indistinguishable in public policy terms from the restraint-of-trade activities of combinations of businessmen, illegal under the federal combines legislation.

As I have noted, it is doubtful whether the unions will prove to have the

strength to make serious inroads in the trucking companies' business through their efforts to restrict the producers' resort to its other sources of transport. But as a matter of principle, there is in my opinion substance to the trucking companies' complaints in this respect. The same complaint can be made, it may be noted, by those owner/operators who are excluded from the collective bargaining process[68] and in their case to a more practical point.

The complaint raises the question of what circumstances there might be which would justify extending the right of collective action to one group and denying it to another where both groups are competing for the same business. And it is not a question of the special needs of exploited individual workmen meriting preference over the interests of stronger businessmen (even if that could otherwise be a justification) since the work of trucking companies is largely done by individual workmen and prejudice to a trucking company's aggregate business will be suffered by the company's employed drivers. In the present case, extending the right to collective action to single-truck, regular-pool owner/operators, while continuing to deny it to trucking companies, floaters, multi-truck owner/operators, or customers is in effect to prefer the interests of regular-pool owner/operators over those of a significant number of other individuals for reasons that are not immediately apparent.

In a sense, of course, any unionized group of employees could be said to be competing with the businesses to which their employer might contract the work his employees are otherwise doing. And the traditional no-contracting-out provisions of collective agreements may be said to evidence the fact that <u>any</u> authorization of collective bargaining activity involves the selective application of collective action rights to only one of the groups in a competitive market - a policy to which we routinely take no exception.

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[68] Those who do not have a steady customer and the multi-truck owner/operators. See supra, page 50, footnote 52 and 53.

There is a difference, however, it seems to me, where the competition between the two groups in question is active rather than merely potential at the time the rights to collective action is selectively granted. Typically, an employer accomplishes work through the use of employees because that arrangement and the direction and control of the work it provides, offers inherent special advantages not readily available through contracting the same work to others. Typically, employees organize themselves at a time when contracting their work is not part of the employer's plan - a possibility, perhaps, but not an active alternative. And the no-contracting-out clause commonly found in the standard, collective-bargaining agreement is negotiated not to cut out an active competitor but to prevent the employer evading the collective bargaining process by escaping to another labour market.

In that situation it is not difficult to see how the public-policy interests in favour of collective bargaining generally can be accepted as outweighing any possible unfairness to potential competitors for the employees' work.

Where, however, as in the aggregate-producing industry, the group seeking the right to collective action is in active competition with others, it is difficult for me to imagine circumstances which would in principle justify the unfairness of a selective grant of such rights, although that it might happen in a particular situation as a result of the routine application of established collective bargaining laws is obviously possible.

Certainly, I have a problem with finding the justification in the aggregate-producing industry for allowing the single-truck, regular-pool owner/operators to organize against the interests of their numerous, active competitors[69].

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[69] For an analysis of the possibility that the extension of collective bargaining rights in these circumstances may be ultra vires the provincial government because of the Combines aspect, see Arthurs, page 101, et seq. His analysis must be read remembering that since he wrote the article the Combines legislation has been extended to encompass services. See also my discussion of the problems presented by the Federal, anti-combines law, at page 79 et seq, infra.

6. Summary and Conclusions

It is important, of course, not to overlook the positive advantages that the application of the dependent contractor provisions to the single-truck, regular-pool owner/operators has provided. Certainly for those owner/operators safely within the ambit of the scheme the benefits of union organization are not insignificant. Through collective bargaining, each unionized group will have the capacity to "maximize" their own rates, benefits and working conditions - that is, to ensure that within the limits effectively set (as previously discussed) by the producers' trucking alternatives, they are at least getting all that there is. And obviously, this process of maximizing rates, benefits and working conditions for bargaining-unit members is likely to have some long-run positive influence on the rates, benefits and working conditions available in that industry for owner/operators generally.

It is an advantage, however, which in my opinion, does not begin to outweigh the serious problems which I have identified, and which I would summarize as follows:

1) that much of the justification for the resort to the collective bargaining regime posited by Professor Arthurs does not apply as the owner/operators in this industry are not utilized by producers to evade employment responsibility nor do they compete in any substantial sense with true employees of the producers.

2) that the long-run effectiveness of union activity in the circumstances of this industry, given the availability of viable, existing alternatives to bargaining-unit trucking, is subject to serious limitation particularly because traditional collective bargaining control strategies do not seem to offer much prospect of success.

3) that the coverage provided by the Labour Relations Act is fragmented and fortuitous by definition.

4) that because of the exclusion of multi-truck owner/operators, the provisions are divisive in organizational terms relative to the needs of the whole group, and incompatible with the natural features of the owner/operator phenomenon.

5) that the scheme leaves in the hands of the producers the ability to determine who will be allowed to qualify for the protection of the scheme.

6) that it motivates producers to avoid a steady customer relationship with owner/operators and thus exacerbates the marketing problem for owner/operators not already within regular pools.

7) that it promotes selfish and parochial union activity counter-productive to the interests of the group as a whole and establishes union rights based on personal rather than job attributes.

8) that it triggers the protection of the Act on grounds not logically related to the causes of the need for protection.

9) that it creates a status of "employee" that is by definition a fortuitously "shifting" status.

10) that the "employee" concept and label is so artificial in the context of this industry relative to people's actual perceptions that the Labour Relations Act is, for that reason alone, of dubious viability as a vehicle for collective action, and

11) that the dependent contractor provisions applied to this industry in effect authorizes and encourages what is truly unfair and unacceptable competition by one select group of competitors against other competitors.

It is my firm opinion that the application of the dependent contractor provisions to owner/operators of dump trucks in the aggregate-producing industry

has established a scheme for collective action by owner/operators which while perhaps better than nothing is really very seriously flawed and ought not to be continued. I remain, however, also absolutely satisfied that the owner/operators in the aggregate-producing industry are dependent contractors and as such are a group who should be authorized to partake in some form of collective action which will provide them with the means to neutralize the potential for exploitation to which they are otherwise exposed.

CHAPTER 6

AN ALTERNATIVE PROPOSAL

The question then arises is it possible to conceive of a scheme of collective action which would meet the needs of the owner/operators in the aggregate-producing industry while avoiding the deficiences and problems presented by the collective bargaining regime.

1. The Problem Presented by Federal Anti-Combines Law

In considering what other legislated schemes might be available one confronts at the outset the constitutional conflict between the Provincial and Federal Governments which is incipient in any Provincial attempt to authorize collective action in face of the Federal anti-combines law.

In analyzing the application of the dependent contractor provisions in the aggregate-producing industry I did not address the question - often raised in my meetings with producers, trucking companies and contractors - as to whether or not the dependent contractor provisions in the Labour Relations Act is legislation ultra vires the Provincial government. The Government would have been sensitive to that possibility when it considered the legislation and the enactment of the legislation must reflect a judgment both on legal and political grounds as to the practical efficacy of such provisions. Furthermore, the ultra vires issue can be challenged at any time in the courts. Indeed, most of the applications for certification in the aggregate-producing industry were opposed by the producers, partly on the grounds that the legislation was ultra vires. In each case in which the issue was raised the Labour Relations Board declined to deal with it, taking the position that that was an issue which it was appropriate for it to leave to the courts. As far as I am aware, none of the respondents in those cases saw fit to take the issue to the courts and presumably that consistent failure to do so may be taken as some reflection of the uncertainty of the issue in legal terms.

It is in any event an artificial issue that ought not in my opinion to weigh

very heavily in any assessment of the substance of the advantages and disadvantages of the application of the dependent contractor provisions in the aggregate-producing industry. A review of Professor Arthurs' analysis of the way in which the anti-combines legislation has related to the legislative activities of the provinces in protecting dependent contractors - particularly in the product market - will show that the provinces have so far been rarely - indeed if ever - stymied by that legislation where they have deemed it necessary to intervene legislatively in favour of collective action. Furthermore, it is always open to the federal legislature to exempt any particular scheme from the ambit of the federal anti-combines legislation.

For the same reasons I have decided not to complicate my analysis of possible alternatives by worrying about the anti-combines law and the potential for constitutional conflicts involving legislation in this area. I am satisfied that it is reasonable to proceed on the assumption that if the legislative policy is sound in other respects a way will be found to bring it within the provincial jurisdiction or to develop a modus vivendi with the Federal Government.

2. The Owner/Operator's Problem Viewed as a Marketing Problem Rather than a Labour Relations Problem

One of the consequences of evoking collective bargaining remedies is the emphasis that is naturally placed in that context on the labour supply aspect of what owner/operators do. But an objective view of an owner/operator's business must recognize that from both the owner/operator's and the customer's point of view the supply of the truck is an equally significant feature and, in fact, that the business is most completely characterized as the supply of a trucking service.

Viewed from that perspective it is possible to see an analogy between the owner/operators' situation and Professor Arthurs' dependent-contractor producers

(such as farmers and fishermen) who are seen to operate in the product market and whose remedies against the exploitive potential of their situation have largely taken the form of co-operative marketing legislation.[70] Professor Arthurs has traced the development of co-operative marketing in the tobacco industry (and its relationship to the restraint-of-trade laws)[71] and, of course, the various legislated marketing-board arrangements for the protection of the producers of milk and other agricultural products are well-known.

The potential for wider application to dependent contractor problems of techniques like those in use in controlling the supply side of agricultural product markets was carefully noted by Professor Arthurs. After describing the tobacco marketing arrangements he said this (at page 113):

> "The tobacco marketing experience conjures up the possibility of provincial intervention to validate and, indeed enforce group buying or group selling, not only in the agricultural commodity market but in a variety of other situations which seem to warrant collective action: dealings between oil companies and the economically vulnerable lessees of their gasoline station; small retailers confronted by monopolistic or oligopolistic suppliers; truck owners with minimal individual bargaining power. The policy implications of such legislative action, and the institutional alternatives available, raise fundamental issues of political and economic importance."

In my opinion, if one thinks of the owner/operator's trucking service as his "product", the analogy between owner/operators of dump trucks and farmers becomes apparent. Because of his investment, his culturally oriented predisposition and the limited nature of his practical options, the owner/operator - like the farmer - is relatively incapable of responding to negative market conditions by diverting resources into other related activities. He must hang in and take

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[70] Although, not exclusively. See for example, Arthurs reference (page 112) to the affinity of Pacific Coast fishermen to collective bargaining processes. There are also provisions in the Nova Scotia and Canada labour legislation for collective bargaining by fishermen ("sharesmen"), and the recent P.E.I. Fishery Enquiry has recommended collective bargaining for fishermen.

[71] Arthurs, p. 112.

what comes or get out of the business altogether. And also like the farmer, because his personal part of any purchaser's needs is typically very small, the owner/operator has almost no capacity on an individual basis to influence the terms on which the majority of his transactions are conducted. Indeed, the evidence in the O.L.R.B. cases in the aggregate-producing and constuction industries makes it clear that rarely is there any significant bargaining by owner/operators over rates. Like the farmer, they are told what the rate is and they take it (or in a rare case leave it). One exception to this pattern of transaction has been the practice in recent years for producers to discuss rates with informal representatives of their regular pool of owner/operators once a year at the beginning of each new season. The regular pools have always had some capacity for influencing their rates because of their producer's interests in retaining their loyalty (which is to say, their exclusive constant availability for his transport needs). It is clear, however, that the negotiating potential has been marginal even in those situations.

In my judgment, the exploitive potential in the owner/operators situation is more usefully viewed as a marketing problem than a labour relations problem. And it may be that a legislated collective marketing regime could be devised which would be able to provide effectively and fairly for the owner/operators' obvious need for collective action in the aggregate-producing industry.

3. A Possible Collective Marketing Scheme

(a) Preface and Introduction

I am sensitive, having reached this juncture in my analysis, that the design of a different system of collective action may not be thought fairly within my terms of reference. It is a consideration in that respect, however, that the weight one is inclined to assign to the problems I have identified concerning the application of the collective bargaining regime in the aggregate-producing

industry will certainly be influenced by one's impression as to the availability of practical alternatives. And it is, of course, impossible to dwell on the faults of any system to the extent that I have in this study without perforce turning one's mind to alternatives.

Accordingly, in the hope that I may at least help to open avenues for exploration in directions different from those contemplated by the dependent contractor provisions of the Labour Relations Act, I propose to outline one possible collective marketing scheme which in my opinion would be worth considering.

I intend at this stage to confine my marketing scheme to the aggregate-producing industry both in the interest of consistency of treatment in this Report and also as a way of simplifying the design of the concepts at the outset. It must be recognized, however, that there is a limit to the extent to which the aggregate-producing industry may be realistically treated as wholly separate from the other areas of bulk trucking in which "R" licenced owner/operated dump trucks are engaged. In some essential respects the need for collective action is related to factors that go beyond the peculiar characteristics of particular elements of the dump truck market, such as the roadbuilding or aggregate-producing industries, to the owner-operated R-class dump truck industry itself. Accordingly, at a later stage, after my analysis of the roadbuilding industry, I will have to consider how the scheme outlined here might depend for its effectiveness on extension to other segments of the dump truck market or perhaps even more generally to the whole of the owner-operated R-class dump truck industry.

In considering the design of a marketing regime I have kept foremost in mind three main principles: first, that any scheme should interfere as little as possible with existing, natural, marketing arrangements; second, that the degree of administrative agency intervention in the working of the scheme should be minimal; and, third, that the interests of each of the current players in the

aggregate transport market - on both the supply and demand side - should receive fair treatment by the scheme. I have, as well, not set out to reduce competition in the industry but to provide a structure which would permit owner/operators an opportunity to compete without being exploited.

What follows is a fairly detailed proposal. It is, however, by no means as detailed nor as fully considered as would be required of any proposal that one would seriously considering implementing. If it were decided that a marketing scheme was worth trying, the actual scheme would have to be worked out with the assistance of people with extensive experience in the business of owning and operating dump trucks and in collaboration with representatives of the trucking companies and the aggregate producers. I am also confident that it would prove necessary to implement any scheme first of all on a pilot-project basis in perhaps just one of the regions in Ontario. I offer the proposal below mainly as a way of illustrating the possibilities of a marketing solution and identifying the issues which any concrete scheme would have to address.

I should mention at once that anyone interested in developing a marketing scheme in the owner-operated dump truck industry would be well advised to consult with the officials of the government of the province of Quebec who over the course of the past seven or eight years have had the experience of developing a controlled marketing solution to the problem of owner/operators of dump trucks. For the most recent legislation governing the Quebec scheme, see the Province of Quebec Transport Act, 1972, c. 55, Regulation 112, enacted April 26, 1978.

I have read the original Quebec bulk-trucking regulation and its predecessors[72] with care but I, of course, have not had the opportunity to study the operation of the regulation in the province of Quebec, and I am certainly in no position to assess how successful it has been. My own proposal while it bears a superficial

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[72] See supra, page 22, footnote 23.

resemblance to the Quebec scheme is fundamentally different.

(b) The Definition of Owner/Operator

Any marketing scheme must begin with a definition of owner/operator - of who will qualify for participation in the scheme. Originally, in the Quebec scheme the label used for owner/operators was "artisan truckers" and they were defined as individuals who own no more than four trucks. In my own previous analysis, as I indicated, I arbitrarily drew the line at three trucks. The essential distinction, I believe, is between persons who as a routine part of their daily work continue to drive one of their own trucks and people who have abandoned the workman's role and have become strictly managers of a business. The terms that I would use to identify the distinction is owner/operators on the one hand and trucking companies on the other. The Quebec legislation also used the term "trucking companies" to identify those who own more than four trucks.

The appropriate definition needs to be worked out by people with extensive experience in owning and operating dump trucks and no doubt it will be influenced by the nature of the marketing scheme as it is ultimately developed. I don't propose, therefore, to offer a specific definition. It is enough at this stage to note the obvious requirement that there be one.

(c) General Description of the Scheme

The proposed scheme has four essential components.

1. Authorized marketing agents for owner/operators having the exclusive right to contract the trucking services of their clients.

2. A range of MTC - established benchmark rates.

3. An arbitration process for controlling any abuse of rate negotiations as judged by reference to the MTC benchmarks.

4. An authorized marketing agent association with the right to set rate policies for its members, subject, however, to the safeguard of the arbitration process.

Put in simple terms, the scheme is designed to put the interests of owner/operators in the hands of authorized marketing agents motivated to look after the interests of owner/operators, with the economic clout to attract customers for their owner/operator clients and to negotiate reasonable terms and conditions for their services, but with the customers' interest safeguarded against abuse of the agents' powers through the continued availability of competing dump truck services from trucking companies or directly from unorganized, individual owner/operators and, alternatively, through recourse to the rate-arbitration process.

The qualities and merits of the scheme can really only be judged in the context of the detailed arrangements.

(d) Authorized Marketing Agent

The granting of authorized marketing agent status would be put in the hands of a special administrative tribunal. It seems likely that the creation of a special section of the Ontario Highway Transport Board would be an appropriate measure in this respect.

The status of authorized marketing agent for owner/operators of "R"-licenced dump trucks would be granted to any individual or organization who applied and who met the conditions of authorization. It is contemplated that profit-making organizations such as the existing transportation brokers as well as co-operatives of owner/operators or, for that matter, unions could qualify for authorization as a marketing agent. The main test of their ability to qualify will be the extent to which they can attract the loyalty of a sufficient number of owner/operators. The only restriction as to who may be authorized as an agent would be that neither trucking companies nor consumers of "R"-licenced dump truck services nor anyone associated directly or indirectly with trucking companies or consumers of trucking services would qualify.

The activity of a marketing agent would be a business much like that of the existing transportation brokers which could be operated on a private enterprise, profit-making basis or on a co-operative basis. It would depend on what could be sold to the owner/operators.

The legislated advantages of being an authorized marketing agent would be as follows:

1. First call on the trucking services of the owner/operator clients who have signed representation contracts with the agent.

2. A protected market position. Only authorized marketing agents would be authorized to negotiate or solicit contracts with consumers of R-class dump truck services on behalf of owner/operators, and the conditions of authorization would be such as to ensure that there would be a reasonably limited number of such authorized agents in a region. Individual owner/operators would continue to be free to sell their own trucking services directly to a customer provided their doing so was not in breach of the obligation to respond to a call for services from an agent where the owner/operator is a party to a representation contract with an agent. The authorized agent would be in the position of being one of a handful of sources in the region of a reliable volume of R-class owner/operator dump truck services.

3. The right to act in concert with other agents through an authorized association of agents in the establishment of a common rate policy. (This feature combined with the agents' effectiveness as a marketing mechanism would provide the incentive for owner/operators to sign up with agents.)

A marketing agent's authority would be limited to contracting for transport of aggregate originating in the agent's regions (the regions would be identical to the regions established by the Ministry of Transport for the purposes of the R-licence) but any agent would be free to seek authorized, marketing-agent status for any number of regions provided it could meet the requirements in each.

There would be no specified limit to the number of authorized marketing agents in any region. However, the administrative tribunal would adapt in each region from time to time the qualifying conditions as to the minimum number of signed-up owner/operators with a view to ensuring that there is at least more than one marketing agent in any one region and discouraging the emergence of so many agents that the viability of any particular agent's business would be threatened.

The requirements for authorization would be as follows:

1. That the applicant is not a trucking company nor a consumer of trucking services and is not associated directly or indirectly with a trucking company or a consumer of trucking services.

2. That the applicant's financial position and arrangements are sufficient to finance the operation of a viable marketing agency business.

3. That the applicant has signed to representation contracts containing minimum standard terms a specified minimum number of R-licenced owner/operators who each have paid a substantial agency fee equal at least to a specified minimum (I am thinking here of something in the order of $150).

(e) The Agent-Owner/Operator Contract

The minimum standard terms of the representation contracts signed by the

applicants' owner/operator prospective clients (which contracts would be conditional upon the applicant being successful in obtaining the authorization) would include: (1) that the contract would be binding on the owner/operator and the agent for a term of at least one year from the date of authorization of the agent; (2) that during the term of the contract the applicant agent would have first call on the owner/operator's trucking services subject to the agent meeting certain notice requirements; (3) that the agent is authorized to enter into trucking contracts on behalf of the owner/operator with such customers and upon such terms and conditions as the agent should determine; (4) that the agent is entitled to a commission on every contract negotiated for the owner/operator equal to some specified percentage of the gross proceeds to the owner/operator (I do not propose that the legislation would specify the amount of the percentage leaving that to be negotiated between the agent and the owner/operators); (5) that the agent has the right to discipline the owner/operator through fines, or suspensions from the rotation list, for failure to comply with any standards of service to the customer that may be specified in the representation contract (the agent requires this authority in order to be able in everybody's interest to ensure to customers a reasonable standard of service); (6) that any such discipline is subject to review and final decision by a committee of the agent's owner/operator clients selected by themselves in accordance with procedures set out in the representation contract and acceptable to the tribunal; (7) that the owner/operator has access to all information concerning any contract negotiated by the agent on his behalf or on behalf of any of the other client owner/operators; (8) specifying the procedure by which the demand for service from the agent's customers is fairly distributed amongst the agent's clients; (9) providing for bonding or other financial arrangements designed to protect the client owner/operator against the agent's financial default or failure; (10) providing that

the client owner/operator shall not obtain trucking work except through the authorized agent except directly on his own behalf subject to the agent's call on his services; and (11) an arbitration clause for resolving any dispute between the client and the agent during the term of the contract (other than disciplinary disputes which will be settled by the review committee referred to above).

I also believe that it is necessary, in order to avoid creating another potentially exploitive situation, that individual owner/operators should be able to terminate their contract with an authorized agent before the expiration of the contract on terms that are not so difficult as to motivate such exploitation but which are not so easy as to destabilize the agent's ability to guarantee delivery of trucking services. I would have in mind here a provision that an owner/operator who terminates his contract before it expires would not be entitled to sign up with another authorized agent until the expirty date of the original contract without becoming liable to the original agent for a substantial amount of liquidated damages to be determined by the administrative tribunal.

The agent should not be able to terminate the contract of any owner/operator prior to its expiration date. The agent's interest in that regard should be sufficiently protected by the right to suspend or discipline subject to review by the owner/operator's review committee.

I believe that it is appropriate to leave the final decision concerning disciplinary matters to a committee of the disciplined owner/operator's peers since the agent's credibility with his customers for the quality of the services that they obtain through him will be a matter of direct concern to all of the agent's owner/operator clients.

(f) MTC Rate Bench-Marks

For a number of years the Ministry of Transport and Communications has

annually established a tonnage-mile rate and alternatively an hourly rate for the employment of R-class tandem dump trucks. The Ministry establishes these rates as the minimum to be paid by contractors working under contract to it. The rate has received widespread acceptance as reflecting fair remuneration for the use of tandem dump trucks. The major problem with it from the owner/operator's point of view is that it is applied only in limited situations. For a description of the MTC Rate and the process by which it is developed and the reception which it has received in the industry, see the report of the Rapoport Inquiry, and the 1977 Final Report of the Select Committee on Highway Transportation of Goods, Pavr VI, Chapter 1, Section 1.4.

The MTC minimum rate, which is compulsory only under MTC contracts, has served in this province as an important bench-mark against which other rates are judged. There appears to be no doubt that it has had a significant influence on the setting of rates generally in the aggregate-producing industry, even though it is rare that the rates actually paid are as high as the MTC rates.

The establishment of industry-wide minimum rates by the Ministry has been contemplated on occasion as a means of rationalizing the R-class dump truck market but a major obstacle that has always been recognized is the difficulty of establishing rates that would apply fairly to the wide variety of trucking situations to be found in this province. Fair compensation for any particular haul will vary with a number of factors: the weight-to-volume ration, the condition of the road from the pit to the delivery site, whether it is uphill or downhill, whether there are posted and/or enforced speed limits on the route, the kind of material that is being hauled (some kinds of stone or gravel represent more serious wear-and-tear on the truck than others), the condition of the ground at the delivery site, the organization at the delivery site - how quickly do they unload and what is the potential for waiting time, the number of times that the

same run is repeated on a particular job, etc. Each of these factors will affect what the owner/operator considers a fair rate for the job and it seems impossible to fashion a fixed rate scale that would fairly accommodate all of those variable factors.

The difficulty of enforcing any compulsory province-wide minimum rate is also obviously not insubstantial.

It should also be a consideration that the enforcement of province-wide minimum rates might well in the long run be incompatible with the continued existence of the owner/operator phenomena. It is impracticable in calculating such a rate to give realistic effect to the economic implications of the non-monetary factors in the owner/operators' business. Any minimum rate that could be defended on classic economic and business terms is likely to be one that would be compatible with the profitable operation of a trucking company and if rigorously enforced it would presumably remove the economic advantage that the individual owner/operators now have.

What is required is a marketing scheme that largely leaves the determination of rates paid on individual contracts to a negotiating process but which prevents the negotiation process being used as an instrument of exploitation.

I would start by having the MTC annually establish a set of bench-mark rates for tandem R-class dump truck services related to a number of typical situations in various areas of the province with the intent that these MTC rates would be available as points of reference in assisting the individual parties to negotiate their own rates and would provide a standard against which the question of abuse could be judged when either party has recourse to the arbitration process described below.

I would not contemplate that the parties' negotiating targets would

necessarily be rates that were as appropriate relative to the bench-mark rates as was possible. It may happen, for example, that in the interest of competing against the trucking companies for the aggregate-hauling business, authorized owner/operator marketing agents might as a matter of pricing policy set their target prices somewhere below the level which would be indicated by the bench-mark rates.

(g) The Arbitration Process

The arbitration process I have in mind would be one that was designed from the point of view not of facilitating the arbitration of disputes about rates but of encouraging a fair negotiation of rates. I would contemplate a substantial arbitration deposit together with a penalty for the losing party so that the resort to arbitration would take place only where one party or the other truly felt they were being abused. I think it would be interesting to look at the possibility of utilizing the concept of final-selection arbitration for this purpose. A final-selection arbitration process which authorizes an arbitrator only to choose between the parties' final offers is particularly suitable for a single-issue arbitration and is the sort of all-or-nothing-at=all prospect which encourages a reasonable attitude towards negotiating a settlement.

To make the arbitration process practical would require provisions which would permit the aggrieved party to either provide or take the services at the other party's last offer without prejudice to the right to take the matter to arbitration after the service was completed and there would have to be stringent penalties for discrimination based on anyone exercising their right of arbitration.

(h) Marketing Agents' Common Pricing Policies

In order to make a further practical contribution to the stabilization of rates at levels that make the owning and operating of R-class dump trucks a viable economic activity and to minimize the extent to which the arbitration

process would have to be relied upon by the agents of the owner/operators, I would propose that the legislation permit the creation of associations of marketing agents which when recognized as such by the administrative tribunal would have the right to participate in a process of establishing common pricing policies for various areas of the province. This process would help to minimize price competition between agents to the benefit of all owner/operators while still leaving the organized owner/operators as a group in competition with the trucking companies and with the non-organized individual owner/operators. The arbitration process would protect the producers and other consumers of R-class dump truck services from abuse by the owner/operators of this power to combine on the rates issue. Such associations might also have a role in adopting province-wide standards of safety and service that would minimize any tendency towards destructive competition between the groups of owner/operators represented by different marketing agents.[73]

(i) Entry to the Industry

The problem which I have not addressed so far is the problem of entry into the industry by new owner/operators. The scheme which I have proposed does not address the problems which are created by too many owner/operators chasing too little work. I believe it goes without saying that any system for stabilizing the owner/operator industry and lessening the degree of exploitation in that industry must be closely coordinated with control of entry into the industry by new owner/operators.

Steps have already been taken in the licencing of R-class dump trucks to attempt to control the rate of entry. As of January 1, 1976, amendments to the Public Commercial Vehicles Act required the Highway Transport Board to certify the public necessity and convenience of new licences before applications for

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[73] Resort might be had in this respect to the provisions of the Industrial Standards Act, R.S.O. 1970, c. 221. Cf. Laskin, Report of Committee of Inquiry into the Industrial Standards Act, 1963.

licences would be granted. However, because of the "grandfathering" provisions in the amendments to the Act and the Transport Board's early policy of not inquiring very closely into the question of public necessity or convenience in the case of applications for new licences from individuals owning a small number of vehicles, these amendments did not lead to any significant control of the entry of new owner/operators.

A description of the control process may be found in the 1977, Final Report of the Select Committee, in Part VI. Chapter 1, Section 1.3.

As a result of the Select Committee's Report and recommendations, the policy of the Highway Transport Board has changed and efforts are now being made to relate very closely the authorization of new "R" licences to the question of public necessity and convenience. The policy currently in affect in that respect may be seen in the 1979 Ontario Highway Transport Board Report on Procedures and Policies for the Regulation of Class R Operation. The policy contemplates the holding of annual hearings in each region to hear representations about the number of additional R-licences that will be required to meet the needs in the upcoming season as they are perceived by the participants in the market in that region at the time.

I would envision that process continuing and with the records which will be available from the new authorized marketing agents, the Highway Transport Board's work may well become easier since the information concerning the adequacy of supply will presumably be more comprehensive and helpful.

It is on this policy of selective granting of new licences in response to demonstrated need that my proposed scheme will depend for preventing the economic viability of the marketing agents' business from being swamped through the availability of an unreasonable number of new individual owner/operators offering their services directly to consumers of R-class dump truck services.

Finally, the new scheme must have some kind of regular procedure by which new owner/operators after they have obtained their licence make their way into the industry.

One route that I think ought to be available is simply the purchase by the new owner/operator of an existing owner/operator's vehicle together with his representation contract with his marketing agent. The trucker's contract with his marketing agent will effectively represent the goodwill which he has built up in his business and it seems to me important that it should be a marketable quantity. To make it transferable for a price to be negotiated between the vendor and the new owner/operator would be to effectively tie the success of the agency (in providing its signed-up owner/operators with acceptable tonnage at reasonable rates - which is the result of the agent and the agent's clients providing its customers with reliable and timely dump truck services) to the success of his own business.

Alternatively, it would be open to a new owner/operator to work as a floater soliciting aggregate-hauling work directly from purchasers of those services in competition with the marketing agents. These floaters would in due course be assimilated by existing marketing agents seeking either to expand its business to service increased purchaser clientele or to replace owner/operators who have left their agency. And, of course, in the event that the authorized agents in a particular region became static organizations and, accordingly, relatively closed shops, it would always be open to the floaters on the outside of the existing agencies to apply for authorization of a new agent.

(j) Other Nuts and Bolts

The legislation would also provide for standardized accounting and reporting procedures for authorized marketing agents, for periodic audits of agents' operations, for annual reports to be filed in the administrative tribunal's

office, and there will be various other nuts and bolts that will have to be put in place in order to make the concept work in practice.

As I have said, any such scheme would have to be developed first of all on a pilot-project basis and, given the newness of the concept, it would be important that the administrative tribunal have the power to make adjustments in the nature of the scheme from time to time as the need is perceived.

(k) What the Scheme Might Achieve

The upshot, in my opinion, would be a scheme that might well achieve the following objectives: (a) It would put the individual owner/operator in the position of being represented in dealings with the purchaser of his services by a person or organization who would have influence and economic clout with those purchasers - the agent being one of a limited number of reliable sources of any substantial volume of dump truck services - and who would be positively motivated by his need to maintain an effective signed-up list of owner/operators to deal with the owner/operators on a fair and reasonable basis. (Where the owner/operators have elected to be represented by an agent that they have organized as a co-operative or with the assistance of a union - or where the union has been authorized as the agent - the control by the owner/operators of the operation of the agency in their interest would obviously be even more direct); (b) It would allow for natural market forces - for example, the competition between the trucking companies with their tractor-trailers and the marketing agents with their predominantly tandem clientele - to have their reasonable influence on the rates being offered for R-class dump truck services while at the same time avoiding the present potential for exploitation; (c) It would avoid hindering the trucking companies or consumers of aggregate (with their own trucks and hired drivers) in their transactions with the producers of aggregate except by the fair competition for the work that the marketing agents would

be able to offer; (d) It should permit existing bona fide transportation brokers to convert their businesses to authorized marketing agencies - a business much like the one they already have.

I think it is a particularly healthy aspect of the proposed scheme that private-enterprise agencies would not be excluded. It seems to me that the marketing agency I have defined is the kind of operation in which the profit motive will make a positive contribution to an efficient operation.

4. Amendments to the Labour Relations Act

I would amend the Labour Relations Act to specifically exempt from the application of the dependent contractor provisions of the Act owner/operators of R-class dump trucks in the aggregate-producing industry. I would propose accomplishing that by amending the Act to give the Ontario Labour Relations Board the power to recommend to the Ministry of Labour regulations exempting from the application of the dependent contractor provisions any group of dependent contractors to whom the Board deems the application of the provisions not appropriate. That would seem to me to be a reasonable structural response to the inherently individualistic nature of the need of Arthurian dependent contractors for access to collective action. From my analysis of the problems in the application of the dependent contractor provisions to the aggregate-producing industry, I am satisfied that it is likely that other groups will emerge to whom the provisions may be technically applicable but for whom they are also inappropriate.

5. Transitional Arrangements

The introduction of any such marketing scheme would also have to make provision for transitional arrangements such as a process for converting present bargaining agents to authorized marketing agents. Such transitional provisions

would have to include as well permanent protections against subsequent discrimination for past union organizing activity similar to the protection now available under the Labour Relations Act.

Under the new marketing scheme the producers' regular pools of owner/operators might well continue to exist and where a producer was sufficiently large it might be open to the regular pool to organize its own marketing agent in order to deal primarily with that particular producer. In any event, the availability of the marketing agency arrangements and the marketing developments in that direction will improve the competitive position of all owner/operators in the industry, and whether or not any particular group in fact resorts to the protection of a marketing agent arrangement their ability to do so will provide them with leverage in dealing with a producer that does not now exist.

I would also point out that should there be a case where a particular producer has created such a dependent relationship with owner/operators that they are in fact indistinguishable from employees except in name only - situations where the producer may be seen to be truly engaged in the black art of evading an employer's responsibilities - the normal provisions of the Labour Relations Act will be available to cover that kind of situation since the classical concept of "employee" particularly as it has developed in recent years would be effective to bring the Act into application in such circumstances.[74]

Part II of this Report dealing with the application of the dependent contractor provisions in the roadbuilding industry follows shortly. It promises to be somewhat different.

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[74] See the review of authorities in this respect in Livingston Transportation Ltd., [1972] O.L.R.B. Rep. 488, and in Livingston Transportation Ltd., [1975] O.L.R.B. Rep 705 at 709. See also Mayer v. Lavigne (1979), 27 O.R. (2d) 129 (C.A.).

APPENDIX A

Ontario

Ministry of Labour

APPOINTMENT

WHEREAS in and by section 34 of Chapter 232 of The Revised Statutes of Ontario, 1970, as amended by 1975, Chapter 76, entitled "The Labour Relations Act", the Honourable Minister of Labour may establish an industrial inquiry commission to inquire into and report on any industrial matter that he considers advisable;

AND WHEREAS the Honourable Minister of Labour deems it to be in the public interest to cause inquiry to be made concerning the matters hereinafter mentioned;

NOW, THEREFORE, pursuant to the authority vested in me, I hereby appoint S. Ronald Ellis, Toronto, to act as an industrial inquiry commission to inquire into and report to me concerning the application of the dependent contractor provisions of The Labour Relations Act in the aggregate producing and road building industries.

Minister of Labour

DATED at Toronto
this 30th day of
October, 1979.

A P P E N D I X B

THE DEPENDENT CONTRACTOR: A STUDY OF THE LEGAL PROBLEMS OF COUNTERVAILING POWER

H. W. ARTHURS*

UNEQUAL power between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area—employment relations—public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area—commercial competition—collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as "independent contractors" rather than "employees" they lack the legal status which is a prerequisite of the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions, because of the combines legislation. They are prisoners of the régime of competition.

Because the choice of either legal designation—"employee" or "independent contractor"—in effect prejudges the issue of their right to bargain collectively, a new term is needed: "dependent contractor." They are "dependent" economically, although legally "contractors." The ambiguity, the paradox, of their position is thus reflected in the term used to identify them.[1] Self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen, and service station lessees personify the dependent contractor.

The primary aim of this study is to trace the legal problems raised by the presence of the dependent contractor on the labour market and the product market under existing law. In many instances, dependent contractors have sought to employ countervailing power in the form of "unions," marketing co-operatives, or other forms of associations for concerted economic action. In acting collectively, or indeed individually, on the labour market they have become involved inevitably not only with employers but with organized employees either as collaborators or as competitors for available work opportunities. Here, the legal issues involve the labour relations legislation as well as the combines legislation. On the product market, group action has

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[1] I first encountered this useful term in Schmidt, *The Law of Labour Relations in Sweden* (1962), chap. III (by Axel Adlercreutz). The coining of the term by a Swedish scholar writing in English at once illustrates the Scandinavian genius in labour relations, and the perils of our institutional chauvinism.

been partially legitimized by co-operative and marketing legislation, although generaly proscribed. Apart from legislation, attempts to aggregate countervailing power have given rise to tort actions by dissident group members, by rival groups, and by those whose superior power is threatened. These will be canvassed. The close parallels of Canadian and American legislative policy toward both labour relations and commercial competition make comparisons inevitable. Where both countries have handled like problems, different solutions present valuable insights; where problems still await treatment in Canada, American experience forecasts the dangers and advantages of possible solutions.

Legal issues are not, by any means, the central issues in a study of the dependent contractor phenomenon. Much more important is the need to rationalize our divergent policies and inconsistent attitudes towards competition and countervailing power. The dependent contractor inhabits the no-man's-land between these policies. His occasional brushes with the law are merely visible reminders of his dilemma. It is in miniature the dilemma of a pluralist society which encourages both group power and economic individualism. However, this study will not suggest, except in the most tentative way, ultimate solutions. Such a task requires a greater range of data than is disclosed by the occasional lawsuit, and a greater economic sophistication than would be claimed by a legal observer. This study, then, is a study of the legal environment.

I. The Dependent Contractor on the Labour Market

(a) *Employee Status Under Labour Relations Legislation*

Dependent contractors have sought to form themselves into "unions." However, the right "to bargain collectively . . . and to engage in concerted activities" was granted only to "employees" by the American National Labour Relations (Wagner) Act of 1935.[2] Congress having attempted no definition of "employee," the labour board and the courts were obliged to undertake that task when marginal groups claimed the protection of the Act. The advancing tide of collective bargaining reached its high-water mark in 1944 in the *Hearst* case.[3] Here groups of newsboys whose contractual arrangements gave them at least the appearance of entrepreneurs were held to be "employees" eligible for the benefits of collective bargaining under the Act. The Supreme Court noted: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[4] Positing that "the Wagner Act is federal legislation . . . intended to solve a national problem on a national scale," the court hesitated to adopt the common law

[2] 49 Stat. 449, s. 7.
[3] *Hearst* v. *N.L.R.B.* (1944), 322 U.S. 111.
[4] *Ibid.* at p. 121.

tests of employment status, since these would vary from state to state. More significantly, the court observed:

> The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors". Myriad forms of service relationships, with infinite and subtle variations, blanket the nation's economy. . . .
>
> Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.[5]

The court went on to note that "interruption of commerce through strikes and unrest," "inequality of bargaining power," and amenability to collective bargaining may as much be characteristics of those who are technically "independent contractors" as of those who are "employees."[6] The appropriate test to determine coverage under the Act must therefore be:

> [W]hen the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the end sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.[7]

However, public sympathy for unions ebbed. In the post-war clamour for restrictive labour legislation, the *Hearst* decision was attacked bitterly because it had broadened the base of union support and the area of collective action.[8] The Taft-Hartley Act of 1947[9] effectively overruled *Hearst* by adding a negative definition of "employee" in section 2(3): "The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor. . . ." The National Labour Relations Board did not mistake this new legislative attitude. In the *Kansas City Star* decision[10] the board refused to follow its pre-1947 rulings and held to be "independent contractors" persons who had formerly been considered "employees":

> The amended Act . . . specifically excludes "independent contractors" from the category of "employees". The legislative history, in this connection, shows that Congress intended that the Board recognize as "employees" those who "work for wages or salaries under direct supervision", and as "independent contractors" those who undertake to do a job for a price, decide how work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profit."[11]

[5] *Ibid.* at p. 127. [6] *Ibid.* [7] *Ibid.* at p. 128.

[8] For a synopsis of congressional opinion see Handler and Hays, *Labor Law* (4th ed., 1963), pp. 175 ff. See also Cox, "Some Aspects of the Labor-Management Relations Act, 1947" (1947), 61 *Harv. L. Rev. 1* at pp. 4 ff.

[9] Publ. L. No. 101, 80th Cong., 1st Sess.

[10] (1948) 76 N.L.R.B. 384. See also *N.L.R.B.* v. *Steinberg* (1950), 182 F. 2d 850 at pp. 854–85 (C.A. 5).

[11] *Ibid.* at p. 388.

Stating this broad formula, of course, was easier than applying it. A number of "badges" of employee status soon emerged. Control, the right to hire or discharge and the obligation to pay other workmen on the job, the chance of profit and ownership of tools and materials, the permanence of the relationship, all bear on the result.[12] But none of these factors, taken separately, was held to be determinative. For example, in *N.L.R.B.* v. *NuCar Carriers*,[13] owner-operators of trucks were held to be employees, despite their ownership of the "tools." In *Martin Marietta*,[14] employee status was found despite a virtual absence of employer control, because of complete dependence on the employer's facilities. Contrariwise, in *Hoosier Petroleum*,[15] notwithstanding complete absorption into the employer's delivery system, independent contractor status survived. At least it is clear that economic fact and not contractual form determines status.[16]

Canadian labour relations legislation either expressly[17] or impliedly[18] likewise confers the right to associate for collective bargaining purposes upon "employees." Certain groups which would otherwise have a clear claim to that title are specifically excluded from the legislation by reason of their close affinity to management,[19] their occupational qualifications,[20] or the industry in which they work.[21] However, the difficult task, which the legislature has left largely to administrative ingenuity, is the definition of that central figure, the "employee." In most Canadian jurisdictions,[22] an "employee" is circularly defined as "a person employed to do skilled or unskilled, manual,

[12] *N.L.R.B.* v. *Phoenix Mutual Life Ins.* (1948), 167 F. 2d 938 (C.A. 7).
[13] (1951) 189 F. 2d 756 (C.A. 3).
[14] (1962) 136 N.L.R.B. 1530.
[15] (1953) 106 N.L.R.B. 629.
[16] *A.B. Co.* (1957), 117 N.L.R.B. 13; *Coca Cola* (1961), 133 N.L.R.B. 762.
[17] Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, s. 3(1).
[18] Labour Relations Act, R.S.O. 1960, c. 202, s. 3(1), confers the right to join a union upon "any person"; this has been construed as meaning "any employee," *R.* v. *O.L.R.B. ex. p. Associated Medical Services* (1964), 44 D.L.R. 2d 407 (S.C.C.).
[19] See, e.g., Labour Relations Act, R.S.O. 1960, c. 202, s. 1(3)(b): "For the purposes of this Act, no person shall be deemed to be an employee . . . who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations." "Managerial functions" need not be exercised over fellow-employees. Thus, "district managers" who supervise groups of newspaper delivery boys are *prima facie* "employees," but are excluded because they exercise managerial functions even though the delivery boys are not employed by the newspaper. *Globe & Mail Ltd.* (1963), C.C.H. L.L.R. P. 16,290 (O.L.R.B.).
[20] See, e.g., Labour Relations Act, R.S.O. 1960, c. 202, s. 1(3)(a), which excludes from the coverage of the legislation a variety of professional employees.
[21] See, e.g., Labour Relations Act, R.S.O. 1960, c. 202, s. 2: This Act does not apply, "(a) to a domestic employed in a private home, (b) to a person employed in agriculture, hunting or trapping, (c) to a person . . . employed in horticulture . . . , (d) to a member of a police force . . . , (e) to a full-time fire fighter . . . , (f) to a teacher. . . ." Crown employees are usually excluded, as are municipal employees in some provinces.
[22] I.R.D.I.A., R.S.C. 1952, c. 152, s. 2(1)(i); see also R.S.B.C. 1960, c. 205, s. 2(1); R.S. Man. 1954, c. 132, s. 2(i); R.S.N.B. 1952, c. 214, s. 1(1)(i); R.S. Newf. 1952, c. 258, s. 2(1)(i); R.S.N.S. 1954, c. 295, s. 1(j); S.P.E.I. 1962, c. 18, s. 1(i). The Trade Union Act, R.S.S. 1953, c. 259, s. 2(5) provides: "'employee' means any person in the employment of any employer. . . ." The Labour Code, Stat. Que. 1964, c. 45, s. 1*m* defines an employee as "a person who performs work for an employer and for remuneration."

clerical or technical work." In Ontario, the term "employee' is not defined at all. Only Alberta has attempted a precise functional definition.[23]

Confronted with the necessity[24] of granting or denying "employee" status to dependent contractors who claimed the right to bargain collectively, Canadian labour boards and courts have been driven to an analysis of the term. Their decisions follow two general approaches, roughly described as the "labour relations" and "common law" tests.

The "labour relations" test blossomed briefly in the reflected warmth of American jurisprudence.[25] In an early decision under the federal wartime labour relations regulations, the Ontario board held:

> We are of opinion that the coverage of the regulations is not limited to those who stand in the proximate technical legal relationship of servant to the master concerned in a particular proceeding. . . .
>
> [I]t is pertinent to consider whether the persons concerned in a particular case are among those who, to paraphrase the wording of the preamble to the Regulations, should collaborate with their employer for the advancement of the enterprise in which they are engaged; should freely discuss matters of mutual interest with their employer; should settle their differences with their employer by peaceful means; and should be free to organize for the conduct of negotiations with their employer.[26]

However, on appeal to the federal board under the then prevailing procedure, the narrower "common law" test was applied: "The test to determine the difference between an employee and an independent contractor is the degree of control exercised by the employer."[27]

The doctrinal basis of the common law test was enunciated shortly afterwards in *Re Lunenburg Sea Products*.[28] Observing that the statute contained no definition of the term "employee," Doull J. concluded that the meaning must therefore be "determined by the general law." Except for Saskatchewan which has even recently persevered in cultivating the "labour relations"

[23]The Alberta Labour Act, R.S.A. 1955, c. 167, provides: "s. 2(g) 'employee' means a person engaged in an industry who is in receipt of or entitled to wages for labour or services performed . . . . (h) 'employer' means a person . . . having control or direction of or being responsible, directly or indirectly, for the employment of and the payment of wages to an employee, (q) 'wage' includes any reward, compensation or remuneration for labour or services whether computed on the basis of time spent or of the amount of labour or services performed or of piece work or otherwise."

[24]As a court remarked in another context: "the [Labour Relations] Board's functions and authority can only begin upon the establishment of a master-servant relationship." *Regina* v. *L.R.B. (B.C.), ex parte White Lunch* (1964), 42 D.L.R. 2d 364 (B.C.S.C.), *per* Sullivan J. at p. 370. Allocation of the primary right, as between court and board, to determine the existence of the relationship is a matter of controversy: see Cook, "Preliminary and Collateral Questions of Fact in Labour Law" (1961), 19 *U. of Toronto Fac. L. Rev. 113.*

[25]*Hearst* v. *N.L.R.B., supra*, n. 3.

[26]*Canada Coal Ltd.* (1946) C.C.H. L.L.R. P. 10,478 (O.L.R.B.).

[27](1946) C.C.H. L.L.R. P. 10,503 (C.L.R.B.).

[28][1947] 3 D.L.R. 195 (N.S.C.A.). See also *Rex* v. *Labour Relations Board*, [1951] 4 D.L.R. 227 (N.S.C.A.).

test,[29] there seems to be general acceptance today of the thesis that "employee" is to be defined not in the light of an individual's ability to benefit through participation in the process of collective bargaining, but rather according to tests evolved at common law.

One such test, traditionally employed to identify those "servants" for whose torts an employer would be vicariously liable, is that of "degree of control." The control test was early adopted, as has been seen,[30] by the wartime federal board. Since that time it has reappeared regularly in the decisions of the Canada Labour Relations Board,[31] and of the boards of Newfoundland,[32] New Brunswick,[33] Alberta,[34] and even Saskatchewan.[35] It may not be irrelevant to point out that even in its original context of vicarious liability the "control" test is under searching scrutiny.[36]

The Ontario board, purporting as well to resort to a common law test,[37] has adopted instead the "fourfold" guide mentioned by Lord Wright, obiter, in the *Montreal Locomotive Works* case:

> In earlier cases a single test, such as the presence or absence of control, was ofter relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control: (2) ownership of the tools; (3) chance of profit: (4) risk of loss. Control is not always conclusive.[38]

In a series of decisions, the Ontario board,[39] and recently the Canada board,[40] have consistently applied this test.

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material. The pertinent question is whether the factors in an employment relationship

[29]*Glacial Rock Insulator Ltd.* (1947), 2 C.L.S. 85–1004; *Dairy & Poultry Co-operative* (1961), C.C.H. L.L.R. P. 16,207 (Sask. L.R.B.); but cf. *Willow Bunch School Unit No. 4* (1960), C.C.H. L.L.R. P. 16,167, (Sask. L.R.B.).

[30]*Canada Coal Ltd., supra*, n. 27; see also *A. M. Smith & Co.* (1946), C.C.H. L.L.R. P. 10,455 (C.L.R.B.).

[31]*Gill Interprovincial Lines* (1962), C.C.H. L.L.R. P. 16,231 (C.L.R.B.).

[32]*Bowater's Newfoundland Pulp and Paper Mills Ltd.* (1957), C.C.H. L.L.R. P. 16,102 (Newf. L.R.B.).

[33]*New Brunswick International Paper Co.* (1948), 2 C.L.S. 65–1017 (N.B.L.R.B.); *Geo. Burchill & Sons* (1949), 2 C.L.S. 65–1019 (N.B.L.R.B.).

[34]*Drinnan Pulpwood Supplies Ltd.* (1962), C.C.H. L.L.R. P. 16,239 (Alta. B.I.R.).

[35]*Willow Bunch School Unit No. 4, supra*, n. 29.

[36]See, e.g., Fleming, *The Law of Torts* (2d. ed., 1961), pp. 326–30. Nor is the issue of vicarious liability irrelevant to labour relations law. In *Lenson Celery Hearts Ltd.* (1963), O.L.R.B. May Mthly. Rep. 107, the board held that a person who rented equipment to his "employer" and was to that extent an independent contractor, was none the less so closely identified with management as to make management vicariously responsible for his illegal anti-union conduct.

[37]*Telegram Publishing Co. Ltd.* (1958), C.C.H. L.L.R. P. 16,126 (O.L.R.B.).

[38]*Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161 at p. 169 (P.C.).

[39]*Telegram Publishing Co. Ltd., supra*, n. 37; *Canada Bread Co. Ltd.* (1961), C.C.H. L.L.R. P. 16,223; *Seven-Up Bottling Co. Ltd.* (1962), C.C.H. L.L.R. P. 16,227; *Cima Ltd.* (1963), O.L.R.B. May Mthly. Rep. 100; *Jockey Club Ltd.* (1963), O.L.R.B. May Mthly. Rep. 112 (O.L.R.B.).

[40]*Pacific Inland Express Ltd.* (1962), C.C.H. L.L.R. P. 16,258 (C.L.R.B.).

which invoke vicarious liability bear any relation to those which invite a régime of collective bargaining. The very terminology—"master" and "servant"—evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party,[41] and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial dependence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose. Indeed, the Ontario board in the *Telegram* case recognized this fact: "[T]he elements to be considered are not alone those that were established for the purpose of determining whether an employer is vicariously responsible for the tortious acts of his servants, but those as well that have a bearing on the labour relations aspects of the relationship. . . ."[42] Yet the *Montreal Locomotive* test was adopted by the Ontario board in the *Telegram* case, and has been followed ever since.

Happily, two elements in Lord Wright's fourfold test focus attention on the efficacy of collective bargaining in a particular relationship. "Chance of profit" and "risk of loss" emphasize the economic realities of the alleged "employee's" position. Where his economic fate is controlled by his employer, experience has shown that the employee can improve his lot only through collective bargaining. Where, on the other hand, there are gains to be made by the investment of capital and the assertion of independent business judgment and initiative, collective bargaining recedes in importance. It is because our public policy insists that entrepreneurs act individually, while inviting employees to act collectively, that these economic realities become crucial in the decision to grant employee status to dependent contractors or withhold it from them under the labour relations acts. Denied such status, or voluntarily rejecting it, clusters of dependent contractors have to cope as individuals with the hazards of a market populated by industrial giants. Such a situation, as will be seen, further emphasizes the contractor's dependence and represents an irritant in the relationship between organized employees and management.

[41] See, e.g., Seavey, *Studies in Agency* (1949), pp. 145 ff.
[42] *Supra* n. 37, at p. 12,333.

(b) Denial or Rejection of Employee Status as a Source of Labour Relations Unrest

For a variety of reasons, employers may prefer to deal with dependent contractors rather than "employees." The obligation to comply with a variety of social welfare and tax statutes depends on the existence of an employment relationship, as indeed does exposure to vicarious liability or consumer complaints. Conversely, the employer receives the benefit of increased sales or faster service by contractors whose income depends on their own exertions instead of an assured wage. A fluctuating demand for services is often more economically met by casual arrangements with a dependent contractor than by a burdensome continuing employment relationship. The dependent contractor may work for less. His individual bargaining power is substantially less than that of an organized group of employees. Capital and maintenance costs of equipment can be shifted to the dependent contractor, thereby further enhancing the bargaining power of the employer, while undermining the contractor's ability to withhold his services. Not least of the attractions of dealing with a dependent contractor is his inability to claim the protecton of the labour relations legislation. Finally, the dependent contractor may be used to undermine the union's bargaining power, which stems from its control of the labour supply.

Succumbing to the temptation of these undeniable advantages, employers have sought to transform employees into independent contractors by the magic of contractual language. While many employees have willingly or reluctantly assisted in this exhibition of the black art, they have not always done so. Both situations present legal conflicts.

In the *Seven-Up* case,[43] two truck drivers "resigned" as employees and immediately entered into individual contracts under which they were to act as "distributors" of the company's products. As distributors, they were given an exclusive territorial franchise, and, in turn, agreed to purchase their entire requirements from the company. In addition, the contracts provided for the purchase by the distributors from the company of trucks, which were to be paid for on an instalment basis. When the company declined to discuss this transaction with the remaining employees, they walked out of the plant —and were thereupon fired. Holding that the discharge was justified on disciplinary grounds, the Ontario Labour Relations Board also vindicated the company's contractual arrangements. However, the board expressly reserved for future decision the issues of whether bargaining with an individual employee before his resignation illegally subverted the union's exclusive bargaining authority,[44] or whether "a scheme intended to destroy

[43] *Seven-Up Bottling Co., supra*, n. 39.

[44] Ontario Labour Relations Act, s. 51(1), provides: "No employer . . . shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union . . . on behalf of or purporting or intended to be binding upon the employees in the bargaining unit or any of them."

the bargaining rights of a union by means of distributorship agreements would violate any section of the Act." In the *Irving Oil* case,[45] the Newfoundland board was able to avoid dealing with virtually identical facts because the employer commenced injunction proceedings to prevent picketing by his protesting employees. The employee status of the "independent distributors" having been put in issue in the injunction proceedings, the board declined to entertain an application raising the same question. The board suggested that the union's proper recourse should have been to seek redress through the grievance procedure on the premise that execution of the distributorship agreements might constitute a violation of the collective agreement. It was on this basis that the Saskatchewan board in *Dairy & Poultry Coop. Marketing Association*[46] ordered an employer to treat an alleged independent contractor as an employee covered by the collective agreement, and subject to its union security provisions.

American courts, dealing with similar problems, have declined to hold unlawful *per se* the conversion of employees into independent contractors, viewing the decision to change operations in this way as one within management's prerogatives.[47] Where, however, the union is able to show that the employer was "motivated by antiunion sentiment and a desire to rid itself of the union," it may be able to require at least that the employer bargain in good faith on the issue of instituting an independent contractor system.[48]

The attempt to preserve union monopoly of work opportunities has led unions to adopt two complementary tactics towards encroaching dependent contractors. On the one hand, there has been an insistence on union membership for the dependent contractor; on the other hand, there have been attempts to rupture relations between non-union dependent contractors and employers. Both of these tactics have been judicially outlawed in a series of British Columbia tort actions.

In *Morrison* v. *Yellow Cab*[49] the owner-driver of a taxicab sued for breach of a contract to provide him with despatching and other services. By way of defence, the defendant taxi company pleaded failure of the plaintiff to comply with a contractual provision requiring him to "operate . . . in conformity with all rules and regulations agreed upon by [defendent] and the Taxi Drivers and Bus Drivers Union, Local 151."[50] The union agreement required that all taxi drivers should be members of the union. As found by Clyne J., "cancellation of despatching services was a coercive step taken by the defendant to compel the plaintiff to continue his membership in the union."[51] Such action he found to be unlawful by virtue of the statutory prohibition in the Labour Relations Act against employer partici-

[45] (1962) C.C.H. L.L.R. P. 16,248 (Newf. L.R.B.).
[46] (1961) C.C.H. L.L.R. P. 16,207 (Sask. L.R.B.).
[47] See, e.g., *N.L.R.B.* v. *Adams Dairy* (1963), 322 F. 2d. 553 (C.A. 8).
[48] *Town & Country Mfrg.* v. *N.L.R.B.* (1963), 316 F. 2d. 846 (C.A. 5).
[49] (1956) 1 D.L.R. 2d. 607 (B.C.S.C.).
[50] *Ibid.* at p. 609. [51] *Ibid.*

pation in a union.[52] Given this statutory policy, Clyne J. chose to read contract between the parties as requiring union membership only of a dri who might be employed by the plaintiff, and not of the plaintiff hims Accordingly, his right to withdraw from union membership was upheld.

Some months later, Clyne J. again reaffirmed the right of a taxi owner to refrain from union membership. In *Scarr* v. *Gower*,[53] the plain sought and obtained an injunction against picketing which was aimed unionization of taxicab owners: "It appears that the union, having b unable legally to force the owners of cabs to become its members, are n using this method of coercing them in spite of the statute which forbids th membership in the union."[54] On the narrow ground that Clyne J. l supplemented the plaintiff's inadequate evidence by referring to facts fou by him in the *Morrison* case,[55] the Court of Appeal vacated the injunct

The substantive issues posed by union attempts to organize independ contractors were thus first to be reviewed by an appellate court in *The* v. *Teamsters*.[56] The facts of the case are well known. Therien was the ow of several trucks, one of which he drove himself, and had supplied truck services from time to time to City Construction Company. That comp was party to a collective agreement with the Teamsters Union, statec "apply to all sub-contractors," which provided that "when Truck Dri are required, competent Union men, members of Local 213, shall be hir The union sought to enroll Therien and his drivers as members. Altho the drivers joined. Therien refused to do so, and the union had him put the job by means which were held to be actionable. The doctrinal sig cance of the *Therien* decision lies in the area of union tort liability threats to act in a manner forbidden by the labour relations legislation. purposes of this narrative, however, the factual issue presented—ur membership for a dependent contractor—is of more importance.

The vagaries of the judicial calendar brought this issue before Clyn once more. His judgment, predictably, followed the earlier analysis *Morrison* v. *Yellow Cab*[57] and *Scarr* v. *Gower*.[58] Union membership is bidden to an "employer" by the Labour Relations Act; union pres exerted to gain that end is therefore illegal. The collective agreement, quiring union membership of all truck drivers, is read as referring onl "employee" drivers and not to self-employed or employer drivers. Nor c any different reading prevail: "[I]f the clauses of the agreement were tended to mean that a subcontractor who is an employer of labour n join the Union or desist from taking part in the work of construction they are illegal as being contrary to the provisions of the *Labour Relat*

[52]Labour Relations Act, Stat. B.C. 1954, c. 17, s. 4(1) provides: "No employer shall participate in or interfere with the formation or administration of a trade-unic contribute financial or other support to it."

[53](1956) 2 D.L.R. 2d. 402 (B.C.S.C.); aff'd. at p. 405 (B.C.C.A.).

[54]*Ibid.* at pp. 404–5.

[55]*Supra* n. 49.

[56](1958) 13 D.L.R. 2d. 347 (B.C.S.C.); aff'd. (1959) 16 D.L.R. 2d. 646 (B.C.C. aff'd. [1960] S.C.R. 265.

[57]*Supra* n. 49.

[58]*Supra* n. 53.

Act and cannot be enforced."[59] In the Court of Appeal, both DesBrisay C.J.B.C. and Sheppard J.A. found unlawful the union's insistence on Therien's membership because such membership was forbidden by the Labour Relations Act.[60] Davey J.A., on the other hand, although condemning the means employed to gain them, found the union's objectives legitimate:

> [T]he real purpose of the union was to force Therien to employ a union truck driver on the truck driven by himself on the company's jobs, as required by the union's understanding of its collective agreement. If Therien would apply for union membership the union would accept him and regard that as compliance with the agreement. But what the union really wanted was not Therien as a union member but a union driver on that truck. The real purpose was not to force an employer to become a union member, but to enforce what the union considered to be the right of its members to preferential employment on company work under the terms of the collective agreement.[61]

None the less, Davey J.A. found that the union security provisions in the collective agreement could not be read as applying to self-employed persons, although he acknowledged that "the question whether a person supplying tools or equipment with his services is self-employed or an employee may be a fine one in a particular case."[62] With respect, this realistic analysis of the union's objectives properly focuses attention on the dependent contractor as a catalyst of labour relations unrest. In the Supreme Court of Canada, the approach of Clyne J. was inferentially approved,[63] although liability was founded primarily upon the wrongful means employed by the union to gain acceptance of its construction of the union security clause in the agreement. The significance of the case, for this discussion, lies in its factual substratum —the destruction of the union's exclusive control of the labour supply— whose true dimensions only Davey J.A. appreciated.

In the United States, by way of contrast, the existence of wage competition or other economic interrelationship between employees and dependent contractors has been held to justify union pressure against the latter.[64] As Douglas J. eloquently noted: "All who haul . . ., whether 'employees' or 'peddlers', are in the same boat. Protection of one protects all. The union plainly has a legitimate interest in the conditions in the industry which increase or reduce employment opportunities or increase or reduce labor's rewards."[65]

There remain to be considered the legal implications of those situations

[59] 13 D.L.R. 2d. at p. 352. Clyne J. at p. 351 had found three bases for illegality: the prohibition against employer participation in unions (s. 4(1)); the prohibition against the use of "coercion or intimidation" to compel union membership (s. 6); and the prohibition against "activity . . . intended to . . . restrict or limit production or services" (s. 5(2)).

[60] 16 D.L.R. 2d. at p. 651, *per* DesBrisay C.J.B.C.; at p. 680, *per* Sheppard J.A.

[61] *Ibid.*, at pp. 658–59.

[62] *Ibid.*, at p. 665.

[63] [1960] S.C.R. at p. 271.

[64] See, e.g., *Senn* v. *Tile Layers Union*, 301 U.S. 468; *Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91; *Bakery Drivers* v. *Wohl*, 315 U.S. 769; *Local 24, I.B.T.* v. *Oliver* (1960), 358 U.S. 283. 362 U.S. 605.

[65] *Meat Drivers* v. *United States* (1962), 371 U.S. 94 at p. 111 (dissenting on another point).

where dependent contractors have invited or welcomed unionization instead of resisting it. Perhaps the best documented of these involved dump-truck owners engaged in hauling sand and gravel in the Toronto area in 1956–57. As a result of their dissatisfaction and unrest—whether from real or imagined causes—an attempt was made by the Teamsters Union to organize a local "union" of truck owners. The "union's" purpose was to bargain with the pit owners over the rates to be paid for hauling sand and gravel. It was thus a classic example of the use of countervailing power by dependent contractors. This organizational campaign led to violence and disruption of deliveries, and ultimately to the appointment of a royal commissioner, Mr. Justice Wilfred Roach, to inquire into the situation. The *Roach Report*[66] raises a unique range of problems in Canadian labour jurisprudence.

The *Report* proceeds throughout on the assumption that the truck owners are not entitled to avail themselves of the procedures established by the Labour Relations Act:

> These truck owners did not constitute a group that it was proper and legitimate for any trade union to organize. . . .
> Mr. Lewis [union counsel] sought to get some comfort out of Section 3 of the Act which reads as follows:
> "Every person is free to join a trade union of his choice and to participate in its lawful activities."
> It is perfectly clear . . . that the words "every person" in Section 3 do not include and were not intended to include an independent contractor because an independent contractor is not an employee.[67]

The effect of permitting independent contractors to join the union, the Commissioner observed, is that ". . . the organization becomes, not 'an organization of employees', but an organization of employees and employers, and accordingly, though it may have previously been a 'trade union' within the Act, it at once loses its character as such and thereby loses its powers and privileges under that Act. . . ."[68]

Such a sweeping statement is without warrant in the case law. While no doubt the Act protects only "employees" in their right to join a union,[69] it is quite another matter to state that the membership of non-employees is fatal to union status under the Act,[70] at least short of a finding of employer domination.[71] While it has been suggested in the Supreme Court of Canada that a "union" representing non-employees cannot while so acting invoke the labour relations legislation,[72] the *Roach Report* goes much further. It

[66] *Report of the Commissioner*, Sept. 30, 1958.
[67] *Report* at pp. 91–92.
[68] *Report* at p. 93.
[69] *Regina* v. *O.L.R.B. ex p.A.M.S.*, *supra*, n. 18 (supervisory employee not protected from discharge for union activity).
[70] *Re Hamilton Construction Association & Builders' Exchange and O.L.R.B.*, [1963] 2 O.R. 293 (membership in union of supervisory employees does not deprive union of status). The American authorities are to the same effect: see *N.L.R.B.* v. *Budd* (1949), 169 F. 2d. 571 (C.A. 6); *Douds* v. *S.I.U.* (1957), 148 F. Supp. 953 (E.D.N.Y.); *N.L.R.B.* v. *N.M.U.* (1960), 274 F. 2d. 167 (C.A. 2).
[71] Labour Relations Act, R.S.O. 1960, c. 202, ss. 10, 48.
[72] *Canadian Fishing Co.* v. *Smith*, [1962] S.C.R. 294 at pp. 302 ff.

suggests that "no union can at the same time be a 'trade union' within the Act and a union outside the Act," and that a union certified under the Act which seeks to enjoy such a "dual status" would become "liable to be decertified."[73] If this proposition is correct, the result would be to terminate the bargaining rights of most unions in the construction industry[74] and in other industries where the line of demarcation between employees and non-employees is blurred. The drastic price which we would pay in terms of labour relations chaos is surely so high that the learned Commissioner's suggestion cannot be accepted. None the less, it exposes a possible legal consequence of participation of dependent contractors with employees in labour unions.

Consideration of the dependent contractor's impact on the labour market —on which collective action is generally permitted—reveals the difficulty of accommodating his interests with those of organized employees under existing law. When the investigation shifts to the product market, the complication of the union is removed, but the obstacles to collective action are even greater.

II. Obstacles to Collective Action on the Product Market

(a) *Anti-combines Legislation*

An apparently basic assumption of a free enterprise economy is that competition between many buyers and sellers is socially desirable. This assumption is reflected in the provisions of the Combines Investigation Act.[75] High judicial authority can be called in aid for the proposition that competition is of vital importance ("Destroy competition and you remove the force by which humanity has reached so far"[76]) and that it is of the essence of public policy ("The public is entitled to the benefit of free competition, and the prohibitions of the [Combines] Act cannot be evaded by good motives"[77]). Collective action, on the other hand, is the antithesis of competition and thus presumptively unlawful if it falls within the purview of the combines statute.

Yet a close reading of the statute discloses an intention to protect competition only in the market for "articles." Section 32(1)(d) prohibits conspiracies, combinations, agreements, and arrangements "to restrain or injure trade or commerce in relation to any article." Other subsections more specifically prohibit similar conduct whose purpose is:

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

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[73] *Report* at p. 94.
[74] *Associated Medical Services* (1961), C.C.H. L.L.R. P. 16,218 (O.L.R.B.) *per* Finkelman, Chairman, at p. 13,126; see also *N.L.R.B.* v. *Employing Bricklayers* (1961), 292 F. 2d. 627 (C.A. 3), Note (1962), 75 *Harv. L. Rev.* 1443.
[75] R.S.C. 1952, c. 314, am. Stat. Can. 1953–54, c. 51; 1960, c. 45.
[76] *Weidman* v. *Shragge* (1912), 46 S.C.R. 1 at p. 28, *per* Idington J.
[77] *Howard Smith Paper Mills* v. *R.*, [1957] S.C.R. 403 at p. 407, *per* Taschereau J.

(b) to prevent, limit or lessen unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,
(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons of property. . . .

Except for the insurance proviso, which is *sui generis*, it is the impact on competition in the product market which is the test of illegality. Similarly, the prohibitions against monopolies and mergers in section 33 relate to "the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles."[78] The statutory definition of "article" is of little assistance: " 'article' means an article or commodity that may be the subject of trade or commerce."[79] The most that can be inferred is that restraints of competition in the supply of services are not within the ban of the Act, unless intended to produce an effect in the product market.

The practical effect of this limitation on dependent contractor action is not altogether clear. In the *Winnipeg Bread* report,[80] route salesmen, admittedly employees, were engaged in delivering bread to private homes. Together with other employees they participated in a strike the purpose of which was to deny bread supplies to supermarkets. The supermarket price of bread had fallen so far below the delivered price that home sales were drastically reduced with a consequent reduction in the commissions of the salesmen. The object of the strike was to restore the narrow differential between supermarket and delivered prices, thus to enhance home sales and the strikers' income. Finding that "the object of the arrangements . . . was to ensure that there should be no price competition, at retail, in the sale of . . . bread,"[81] the Combines Commissioner made a finding that the Act had been violated. If this reasoning is correct, then withholding services in order to enhance the price of an "article" is forbidden, although it is the price of the services themselves that motivates the conduct. This case illustrates the difficulty of isolating the cost of articles from that of services rendered in connection therewith.[82] Finally, although, *Winnipeg Bread* involved employees, its holding is hardly less significant for those who are businessmen in the eyes of the law.

Given an intention to enhance the price of "articles" in the product market, the Combines Investigation Act in section 4 exculpates such conduct on the part of "combinations of workmen or employees for their own reasonable protection as such workmen or employees." Of what benefit is this exemption to dependent contractors?

[78]Sections 2(e) and 2(f), respectively, define merger and monopoly, and use the term "business" which is defined in s. 2(aa); see *infra*.

[79]Section 2(a).

[80]*Investigation into an alleged combine in connection with the distribution and sale of bread and other bakery products in the Winnipeg area*, Report of the Commissioner, Combines Investigation Act (1952).

[81]*Ibid.*

[82]See also Gosse, *The Law on Competition in Canada* (1962), at pp. 105–7; Restrictive Trade Practices Commission, *Report re Town of Duvernay Tenders* (1964) (cases cited).

In the *Roach Report* it was found that a conspiracy existed, in violation of the Combines Investigation Act, "to limit unduly the facilities for transporting, supplying and dealing in" sand and gravel, by reason of the concerted refusal of owner-operators to work except at collectively bargained rates.[83] In answer to a plea that such conduct was permitted by the exculpatory language of section 4, the Commissioner held: "The purpose of that combination was not the reasonable protection of themselves as workmen or employees but was to benefit the truck owners who were independent contractors. Not being a combination of workmen or employers they did not have the immunity provided. . . ."[84]

With respect, the problem requires closer scrutiny. The immunity is extended to both "workmen" and "employees." Unless the term "workmen" is meaningless, it must embrace dependent contractors who are not employees in the legal sense, although they may be *ejusdem generis* in the economic sense. Owner-operators, though not "employees," should be held to be "workmen" on any reasonable definition of that term. Thus, dependent contractors may be immune from prosecution for anti-competitive practices, subject only to the definition of the term "reasonable protection" in section 4. In the *Winnipeg Bread* situation (which involved employees rather than dependent contractors) the Commissioner noted that concerted action having as its objective the stifling of competition on the product market would create "intolerable" conditions for suppliers or create "a new expedient" for evasion of the Act. These risks led him to find that the bounds of "reasonable protection" had been exceeded. This approach involves real risks: definition of the "reasonableness" of the "protection" sought invites judicial assessment of the demands made; contrariwise, collective bargaining leaves such assessment to the relative economic strength of the parties. That the section has not been authoritatively canvassed since it was first introduced[85] is indeed surprising. Fortunately, the Canadian courts may be aided in the difficult tasks of interpretation and policy orientation by the American jurisprudence which is based on similar legislative provisions.

The effect of antitrust legislation on the legitimacy of union activity has been a central theme in American labour relations law. The dramatic account of labour's emancipation from the antitrust laws is recorded elsewhere.[86] Suffice it to say that unions acting on the labour market, in their own self-interest and unaided by businessmen, are today beyond the reach

[83] *Supra*, n. 66. The Commissioner was actually dealing with The Criminal Code, Stat. Can. 1953–54, c. 51, s. 411(1), which was virtually identical to the Combines Investigation Act, s. 32(1). Section 411(3) of the Code corresponded to section 4 of the Combines Act. Section 411 was repealed by Stat. Can. 1960, c. 45, s. 21.

[84] *Report* at p. 98.

[85] S.C. 1960, c. 46, s. 3.

[86] See, e.g., Gregory, *Labor and the Law* (2d. rev. ed., 1961), chap. VIII, p. 10; Boudin, "Labor and the Anti-Trust Laws" (1939), 39 *Col. L. Rev.* 1283 (1940), 40 *Col. L. Rev.* 13; Cox, "Labor and the Anti-Trust Laws" (1955), 104 *U. Pa. L. Rev.* 252; Winter, "Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activity" (1963), 73 *Yale L.J.* 14.

of the antitrust laws.[87] With this basic premise as a point of departure, the shadowy immunity afforded "unions" of dependent contractors invites exploration.

The necessity of distinguishing between employee unions and dependent contractor groups who claim the designation "union" is well illustrated by the *Columbia River* case.[88] In that case, a group of fishermen had purported to organize themselves into a C.I.O. union. Because many members owned or leased their own boats, and indeed employed others to man them, organization for collective bargaining in the sale of their catch was held to constitute a combination in restraint of trade. The U.S. Supreme Court noted that the federal labour legislation was "not intended to have application to disputes over the sale of commodities,"[89] and therefore denied the labour union immunity. While the decision has been followed[90]—and, indeed, extended[91]—it has also been bitterly attacked. Terming the court's analysis "conceptualistic," one commentator suggested that the decision "while providing a ready-mix formula of quick and easy judicial application, makes no sense in terms of economic realities involved. . . ."[92] Instead, he suggested, the *Hearst*[93] test should be used in determining who is eligible for the labour exemption from the antitrust policy: where organization is needed to redress the "inequality of bargaining power," where "the economic facts of the relation make it more nearly one of employment than of independent business enterprise," there should be no prohibition against collective bargaining. Whatever the need for collective bargaining on the facts of the *Columbia River* case, it would be surprising for an American court today to accept the *Hearst* definition for purposes of antitrust law when it has been statutorily repudiated for purposes of labour relations law.

While the *Columbia River* case turned at least partly on the fact that the dependent contractors were selling commodities, the *Los Angeles Meat Drivers* case[94] involved mere middlemen. Owner-operators of trucks, known as "grease peddlers," purchased waste grease from restaurants and resold it to one of a group of eight processors. The processors also purchased grease directly from the larger hotels and restaurants, which was hauled by the processors' own employees. The union which represented the employee-drivers formed a separate "Local 626-B" in which the grease peddlers were enrolled, through which they bargained collectively with both suppliers and customers, and under which exclusive "routes" were established to preclude

[87] *U.S.* v. *Hutcheson* (1940), 312 U.S. 219; *Allen Bradley* v. *Loc. Union No. 3, I.B.E.W.* (1945), 325 U.S. 797.

[88] *Columbia River Packers* v. *Hinton* (1942), 315 U.S. 143.

[89] 315 U.S. at p. 145.

[90] See, e.g., *Hawaiian Tuna Packers* v. *I.L.W.U.* (1947), 72 F. Supp. 562 (D.C. Haw.); *Commonwealth* v. *McHugh* (1950), 93 N.E. 2d. 751 (Mass.); *Gulf Coast Shrimpers* v. *U.S.* (1956), 235 F. 2d. 658 (C.A. 5).

[91] *Los Angeles Meat & Provision Drivers* v. *U.S.* (1962), 378 U.S. 94; see *infra*.

[92] Gottesman, "Restraint of Trade—Employees or Enterprisers" (1947–48), 15 *U. Chi. L. Rev.* 638 at p. 667.

[93] *Supra* n. 3.

[94] *Supra* n. 91.

competition between the peddlers. The peddlers, admittedly, were not employees, and there was no evidence to indicate that the wage standards of employee-drivers were in any way undermined by the peddlers. The court followed the *Columbia River* decision, held the arrangement unlawful, and ordered dissolution of "Local 626-B." Goldberg J. wrote a concurring opinion in which he emphasized that a union's legitimate interest in the activities of dependent contractors might "extend beyond mere direct job and wage competition." He likewise noted that, on the record, the court was not deciding "whether as an original matter the grease peddlers might properly associate themselves or affiliate with a sympathetic and genuinely interested union to improve their economic condition."[95] The decision, however, does seem to leave the dependent contractor within the ambit of antitrust policy. It is in this light that it has been viewed with approval: "Such an exemption [as was claimed by the grease peddlers] to the sanctions of the Sherman Act would allow a number of small businessmen to combine into a guildlike agency having substantial economic power to act as a monopoly."[96] There are, of course, situations where such exemptions may be expressly conferred as a matter of public policy.[97] Moreover, it is at least arguable that neither *Columbia River* nor *Los Angeles Meat Drivers* deals with dependent contractors who would fall within the term "workmen" in section 4 of the Canadian Act or its American analogue.[98] But if American precedent prevails, collective bargaining by dependent contractors will be held illegal under our combines statute where it touches the product market.

(b) Criminal Conspiracy

A policy similar to, but one which antedates, suspicion of concerted business activity, is enshrined in the conspiracy section of the Criminal Code:

S. 408(2) Everyone who conspires with any one
(a) to effect an unlawful purpose, or
(b) to effect a lawful purpose by unlawful means, is guilty of an indictable offence. . . .

From this general prohibition there are two relevant exemptions, sections 409 and 410. Section 409(1) defines conspiracies in restraint of trade as agreements "to do . . . any unlawful act in restraint of trade." Since trade unions had historically been stigmatized as combinations in restraint of trade,[99] section 409(2) was necessary to legitimize their existence: "The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful. . . ." This section is virtually identical in terms with

[95]*Ibid.* at pp. 104–5.
[96]Note (1963), 16 *Vand. L. Rev.* 950 at p. 954. [97]See *infra.*
[98]Clayton Act, s. 6; 38 Stat. 730, 15 U.S.C.A., s. 12 *et seq.* (1914); cf. *A.M.A.* v. *U.S.* (1943), 317 U.S. 519 (conviction under antitrust laws of American Medical Association for organizing doctors' boycott of co-operative health insurance plan); see also Note, "Medical Societies and Medical Service Plans—From the Law of Associations to the Law of Antitrust" (1954–55), 22 *U. Chi. L. Rev.* 694.
[99]Sayre, "Criminal Conspiracy" (1921), 35 *Harv. L. Rev.* 393; Gregory, *Labor and the Law*, 18 ff.; Boudin, *op. cit. supra*, n. 86; Kahn-Freund, "The Illegality of a Trade Union" (1944), 7 *Mod. L. Rev.* 192.

section 29 of the federal Trade Unions Act,[100] save that the latter provision expressly immunizes a trade union from "criminal prosecution for conspiracy or otherwise" by reason merely that its objects are in restraint of trade. The two sections are descended from a common ancestor—the Trade Unions Act of 1872[101]—and were obviously intended to relieve trade unions of the same burden.

Prima facie a combination or association of dependent contractors is proscribed by section 408(2). To the extent that they employ unlawful means, they fall under the ban of section 408(2)(b). More important, amongst the most obvious of unlawful purposes forbidden by section 408(2)(a) is that which describes the objectives of dependent contractors acting concertedly: an intention to restrain trade. Unless protected by section 409(2) as a "trade union," a combination of dependent contractors would thus be illegal. The Code itself does not define the term "trade union." While modern collective bargaining legislation[102]—and contemporary usage—identifies a trade union as "an organization of employees," the older usage implied no such restriction in membership. Indeed, in the Trade Unions Act the definition continues to read: ". . . such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade."[103] If the trade union exemption in section 409 is given similar latitude it would appear to cover dependent contractors.[104]

A like problem in definition arises in connection with section 410 which relieves against prosecution for conspiracy if the act complained of is the refusal "to work with any workman or for any employer" or any other act "for the purpose of a trade combination."[105] "Trade combinations" are defined in section 410(2) as: ". . . any combination between masters or workmen *or other persons* for the purpose of regulating or altering the relations between masters or workmen, or *the conduct of a master . . . in respect of his business*. . . ." Combinations of dependent contractors, whether or not they may be "workmen," surely embrace such "other persons" as the section contemplates, when their objective is to "regulate . . . the conduct of a master . . . in respect of his business." None the less, the *Roach Report* suggested that concerted action by owner-operators of trucks was not protected by section 410(2).[106]

[100]Originally S.C. 1872, c. 30, now R.S.C. 1952, c. 267. See also Rights of Labour Act, R.S.O. 1960, c. 354, s. 2.

[101]*Supra* n. 100. See [1892] 2 Hansard 3644

[102]Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, s. 2(1)(r); Labour Relations Act, R.S.O. 1960, c. 202, s. 1(1)(j).

[103]R.S.C. 1952, c. 267, s. 2.

[104]See, e.g., *Mugford v. St. John's Truckmen's Protective Union*, [1955] 5 D.L.R. 644 (Nfld. S.C.) (Newfoundland Trade Union Act, R.S. Nfld. 1952, c. 262, applied to trade union of employers in civil suit).

[105]Section 410(1)(a)(b).

[106]*Supra* n. 66, at p. 97.

Even assuming that dependent contractors could constitute a "trade union" under section 409 or a "trade combination" under section 410, there remains the same vital issue that was raised in connection with the "reasonable protection" provision in the Combines Investigation Act: will concerted activity which affects the product market escape judicial censure? In *S.I.U. v. Stern*[107] a commercial boycott organized by a *bona fide* labour union provoked a sober, though obiter, warning in the Supreme Court of Canada which would apply with even greater force to dependent contractors:

> The criminal law has been amended to grant immunity to trade unions from prosecution for agreements in restraint of trade. This is a qualified immunity which flows from a policy designed to promote *legitimate* endeauvours of the working classes. It does not follow that this special immunity will operate in cases of combinations absolutely foreign to such endeavours and of which the end or the means are unlawful. It is unnecessary, however, to pursue the matter. . . .[108]

In the realm of economic ends or purposes, the label "legitimate" has no place. In a market economy self-interest is justification enough.[109]

(c) Tort Liability

As has been suggested, concerted activity by dependent contractors may involve them in liability in tort. Doctrinal analysis of liability for the infliction of economic harm is inseparable from, and often less important than, analysis of fact-patterns and value judgments. Because the field of economic torts has been so often and thoroughly tilled,[110] that portion of it which relates to concerted activities by dependent contractors yields only a few thorny thistles, individually interesting for their fact colouration, yet insufficient to cluster in a meaningful nosegay.

Two Ontario trial decisions in the early 1940's relate to economic conflict in the poultry trade. In *Rubenstein* v. *Kumer*,[111] a "union" of chicken peddlers sought, by picketing, to compel a wholesaler to purchase his requirements from them on collectively negotiated terms. As Roach J. (as he then was) noted, "The case is unusual in that the acts complained of are not the result of a dispute between employer and employee. . . ."[112] In response to the suggestion that a collective agreement with dependent contractors would violate the combines legislation,[113] the learned judge declined to so hold in interlocutory proceedings, although he noted that "the proposed agreement is not *ex facie* illegal."[114] Moreover, relying on *Robinson* v.

[107] (1961) 29 D.L.R. 2d. 29 (S.C.C.).

[108] *Ibid.* at p. 34 (italics added). See also *Lefebvre* v. *Knott* (1907), 13 C.C.C. 223 Que. Dist. Ct.), in which the court evaluated, and approved, the purposes of an employers' association engaged in economic conflict with a union.

[109] *Crofter* v. *Veitch*, [1942] A.C. 435 (P.C.).

[110] Arthurs, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship" (1960), 38 *Can. B. Rev.* 346; Kennedy and Kinkelman, *The Right to Trade* (1930); Thompson, "Protection of the Right to Work in the Law of Torts" (1963), 41 *Can. B. Rev.* 167.

[111] [1940] 2 D.L.R. 691 (Ont. H.C.).

[112] *Ibid.* at p. 694.

[113] Criminal Code, R.S.C. 1927, c. 36, s. 498; Combines Investigation Act, R.S.C. 1927, c. 26.

[114] *Ibid.* at p. 695.

Adams,[115] he held that he could not enjoin conduct merely because it violated a criminal statute. Such an approach is directly contrary to that adopted in the British Columbia decisions of Clyne J. already referred to,[116] and in recent decisions of the Supreme Court of Canada,[117] where an intention to violate the prohibitions of the labour relations legislation was the sole basis of civil liability. None the less, *Robinson* v. *Adams*, though overlooked, has never been overruled.

On the substantive issue, Roach J. made an observation which was strangely relevant to his duties as Royal Commissioner[118] two decades later:

> The fact that the Union in this case happens to be a union of merchants instead of the conventional labour union makes no difference. . . . Merchants have the same right under English common law to unite for their mutual benefit and protection as have labourers and craftsmen. . . . True, the *Cr. Code*,—S. 497 [now s. 409(2)] and s. 498(2) [now Combines Investigation Act, s. 4],—contains limitations or exceptions in favour of trade unions, but that is another matter.[119]

His decision was followed by Rose C.J.H.C. in *Wasserman* v. *Sopman*,[120] in declining to prevent picketing by a group comprising both unionists and peddlers.

Roach J.'s thesis, regarding the propriety of action by a "union of merchants" was not adverted to by Thompson J. in his recent decision, *Acton Excavating* v. *Caruso*.[121] In the *Acton* case, independent owner-operators of trucks engaged in haulage operations for the plaintiff firm sought to bargain collectively as a local of the Teamsters Union. The plaintiff firm also owned and operated its own trucks whose drivers were unionized employees, in respect of whom a different Teamsters local had signed a collective agreement. Unsuccessful negotiations for a collective agreement and other grievances culminated in a concerted work stoppage and picketing by the owner-operators. Plaintiff sought an injunction against all picketing. The "union" urged the existence of a "right at common law to combine for the purposes of advancing their trade interests," citing in support *Sorrell* v. *Smith*,[122] which Roach J. had relied upon in the *Rubenstein* case. Observing enigmatically that the defendants "are not beyond the control of the Criminal Law, including the Criminal Code and the Combines Investigation Act,"[123] Thompson J. made no direct response to the defendants' contention. Instead, he resolved the case by holding that the burden of establishing justification for the interference with plaintiff's trade fell upon the defendant, which issue he refused to determine in interlocutory proceedings. By placing the onus on the defendants and then refusing them an

[115][1925] 1 D.L.R. 359 (Ont. C.A.).
[116]*Supra*, pp. 97–98.
[117]*Therien* v. *Teamsters*, [1960] S.C.R. 265; *Gagnon* v. *Foundation Maritime*, [1961] S.C.R. 435.
[118]*Rebori*, *supra* n. 66.
[119]*Supra* n. 111, at p. 696.
[120][1942] O.R. 313.
[121]64 C.L.L.C. 11,117 (Ont. H.C.).
[122][1925] A.C. 700. This case held to be lawful concerted economic action by non-employee newsdealers.
[123]*Supra* n. 121, at p. 11,120.

opportunity to discharge it, Thompson J. adopted a procedure which was bound to yield a result opposite to those reached by Roach J. and Rose C.J.H.C.

There remains for consideration the issue of whether groups of dependent contractors can cloak their activities in the civil immunities conferred by the Ontario Rights of Labour Act[124] and counterpart legislation.[125] The statute defines a "trade union" as "a combination, whether temporary or permanent, having among its objects the regulating of relations between employees and employers or between employees and employees or between employers and employers."[126] As under the Criminal Code and the labour relations legislation, the status of dependent contractors is unclear. The definition seems, apparently, to embrace all industrial combatants; narrowly construed it will catch only dependent contractors who themselves are employers of casual labour. The rewards for falling within the definition are high indeed: avoidance of the civil consequences of the restraint of trade doctrine,[127] immunity from actions of civil conspiracy for "trade union" members,[128] and apparent immunity for the "trade union" itself from all court proceedings.[129] Such rewards, however, may well be denied to organizations of dependent contractors, at least when they have admitted to membership "employees" within the narrow meaning of that term. As the *Roach Report* noted, the section "does not contemplate a combination of employees and employers for any purpose. Therefore a union which consists of a combination of truck owners and employees of truck owners is not a trade union within that Act and the protection given by that Act does not extend to such a union."[130]

In sum, then, the legal risks run by dependent contractors when they seek to act collectively are substantial. The Combines Investigation Act, the Criminal Code, and the common law all inhibit the formation of units of countervailing power by dependent contractors. From each of these there may be statutory immunity, but its limits are imprecise. By contrast, in a few special cases clear provision has been made to authorize collective bargaining by dependent contractors.

III. LEGISLATION PERMITTING COLLECTIVE BARGAINING BY DEPENDENT CONTRACTORS

Legislation in several provinces has, by encouraging collective action, attempted to redress the power imbalance between legally independent but

[124]R.S.O. 1960, c. 354.
[125]Trade Union Act, R.S.S. 1953, c. 259, ss. 21–23.
[126]R.S.O. 1960, c. 354, s. 1(b).
[127]Section 2. Cf. *Starr* v. *Chase*, [1924] S.C.R. 495. Roach J.A. at p. 105 of his *Report* suggests that this section is *ultra vires*.
[128]Section 3(1). Cf. *Mugford* v. *St. John's Truckmen's Protective Union*, *supra* n. 104.
[129]Section 3(3). But cf. *Therien* v. *Teamsters*, [1960] S.C.R. 265.
[130]*Report*, *supra* n. 66, at p. 95. Such a conclusion is at least arguably too broad. The section does not define the membership of a "trade union," but only the relationships with which it proposes to deal.

economically dependent contractors on the one hand and monopoly consumers of their goods or services on the other. Such legislation covers fishermen,[131] farmers,[132] and presumably other producer groups.[133] Generally speaking, it involves a co-operative or other producer-controlled marketing or purchasing agency. However, at the threshhold of any examination of these statutes lies a constitutional issue. The federal government, under its criminal law power,[134] has forbidden combinations which restrict competition, yet collective economic action, which negatives competition, has been licensed or encouraged by provincial legislation. This apparent collision of policies has been judicially noted and judicially dismissed. Provincial legislation permitting executive promulgation of uniform employment standards following industry-wide consultation was upheld in *Ontario Boys' Wear* v. *Advisory Committee*.[135] Because the decision relates to the suppression of competition on the employment market, which since *Snider*[136] has been presumptively provincial, its relevance to anticompetitive practices on the product market is questionable. First, the combines legislation has not "occupied the field" of employment. Secondly, even where industrial standards legislation purports to affect service transactions on the retail market,[137] price-fixing is by governmental, not private, action.

Agricultural marketing poses entirely different issues. In *Reference Re Farm Products Marketing Act*[138] the Supreme Court of Canada upheld provincial legislation which created agencies with power to license the production and marketing of agricultural commodities, to act as the sole vendor of such commodities, and thereby to preclude the operation of competitive forces in the commodity market. The agencies are constituted by the producers concerned, but their powers are statutory. In answer to the contention that such provincial legislation was *ultra vires*, being pre-empted by the Combines Investigation Act, the court relied on the *Ontario Boys' Wear* case.[139] For reasons already stated that case is of little assistance in dealing with product market restraints. Of more significance is the sugges-

[131]Fishermen's Federation Act, R.S.N.S. 1954, c. 103; Fishermen's Union Act, R.S.P.E.I. 1951, c. 61; Fishermen's Union Act, R.S.N.B. 1952, c. 89; Newfoundland Federation of Fishermen Act, S. Newf. 1951, c. 70; Fisheries Act, R.S.B.C. 1961, c. 150, am. S.B.C. 1961, c. 19, s. 25.

[132]See, e.g., Farm Products Marketing Act, R.S.O. 1960, c. 137; Cooperative Marketing Associations Act, R.S.S. 1954, c. 225. As will be seen, *infra*, the approach of many provinces is to constitute a regulatory agency with power to market commodities. Because these agencies are often representative of producers, they become—in effect—the vehicle for collective action, although they may exercise statutory powers.

[133]See, e.g., Cooperative Associations Act, R.S.B.C. 1960, c. 77; R.S.A. 1955, c. 59; R.S.S. 1954, c. 224. Legislation such as the Industrial Standards Act, R.S.O. 1960, c. 186, appears to contemplate price-fixing, by consensus, by sellers of services on the retail market, e.g. barbers. See Laskin (Chmn.), *Committee of Inquiry into the Industrial Standards Act* (Ont., 1963), at p. 74.

[134]*P.A.T.A.* v. *A.G. Canada*, [1931] A.C. 310 (P.C.).

[135][1944] S.C.R. 349, aff'g. [1943] O.R. 526 (C.A.), aff'g. [1942] O.R. 518.

[136]*Toronto Electric Commr's.* v. *Snider*, [1925] A.C. 396 (P.C.).

[137]See *R.* v. *Burdick*, [1938] O.W.N. 11, 169 (prosecution of self-employed barber under industrial standards legislation).

[138][1937] S.C.R. 198.

[139]*Supra* n. 135.

tion[140] that counterpart federal marketing legislation[141] evidences a policy determination that the regulation of agricultural marketing falls outside the "scope of anti-monopoly legislation." This view is a more tenable version of the thesis, expressed in another judgment, that "to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state."[142] The quoted words, of course, beg the question of whether the legislature *is* "empowered" to authorize transgressions of federal policy. What would clarify the situation is a statutorily expressed exemption from the combines legislation for agricultural commodity marketing.

What has not yet been canvassed is the constitutional issue presented by co-operative commodity marketing *without* express legislative sanction. In the *Container Materials* case,[143] for example, manufacturers of fibre board boxes incorporated a company (under federal charter) to act as their exclusive sales agent; this corporate device was used to create a monopoly in the market by means closely analogous to those employed by ordinary marketing co-operatives. Such an arrangement was found unlawful. Could the offending manufacturers have escaped conviction by incorporating under provincial cooperative legislation? An affirmative answer would destroy federal anti-combines policy. Such a direct collision between federal and provincial statutes must be resolved in favour of the senior government. Yet co-operatives are extremely useful social institutions in welding economically helpless individuals into a viable group.[144] Here again the solution is for the federal government to provide appropriate legislative exemptions. As the law now stands a genuine need to stabilize economic conditions by non-statutory price fixing, despite obvious benefits to competitors or the community, does not justify violation of the combines legislation.[145]

Collective bargaining by fishermen provides interesting contrasts in provincial policies. Fishermen are dependent contractors. They are apparently excluded from the general labour relations statutes if they fish for a share of the catch,[146] or if they own their own boats. Yet, as observers have noted, "Fishermen on the Pacific Coast . . . identify themselves more closely in interest and policy with wage-earners than with farmers, businessmen, or other 'independent proprietors'. They were among the first occupations in this region to organize and strike. . . ."[147] Collective bargaining between

[140][1957] S.C.R. at p. 258, *per* Fauteux J.
[141]Agricultural Products Marketing Act, R.S.C. 1952, c. 5.
[142][1957] S.C.R. at p. 239, *per* Locke J.
[143][1942] S.C.R. 147. [144]See generally, Frances, *Canadian Cooperative Law*.
[145]In *Howard Smith Paper Mills* v. *The Queen*, [1957] S.C.R. 403 at p. 407, Teschereau J. stated: "It is my strong view that traders, manufacturers and *producers* cannot, as the law now stands, monopolize a substantial part of the markets of the country in given industries, to promote their own business interests, and then set themselves up as public benefactors by saying to the Courts that the conspiracy was organized in order to achieve the stabilization of prices and *production*." (Emphasis added.) *Quaere* whether the reference to "producers" and "production" is intended to include primary producers such as farmers and fishermen. But see *Reference re. Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379. [146]See *supra* n. 28.
[147]Jamieson and Gladstone, "Unionism in the Fishing Industry of British Columbia" (1950), 16 *C.J.E.P.S.* 1 at p. 2; see also *op. cit.* at pp. 146 ff.

fishermen and processing plants over the price of fish is apparently so deeply entrenched in British Columbia that the Fisheries Act[148] assumes its existence and provides for the arbitration of differences.

On the Atlantic coast, New Brunswick, Prince Edward Island, and Newfoundland have adopted[149] a more permissive attitude by incorporating Fishermen's Unions, amongst whose objects is the promotion of co-operative marketing. Nova Scotia, on the other hand, has established[150] a procedure virtually identical to that available under its labour relations statute, whereby a fishermen's union can (by majority vote) become the exclusive bargaining agent for all fishermen within a county.

While the British Columbia situation has received at least temporary federal immunity,[151] its legality is now under scrutiny by the combines investigation authorities.[152] Assuming that it is found to be illegal, there remains to be determined the impact of a provincial statute of the Nova Scotia type.

The history of co-operative marketing in the tobacco industry provides an instructive illustration of the interaction of divergent provincial and federal policies. When competition was briefly abandoned as federal policy in the 1930's in favour of the semi-socialized economy of the Bennett "New Deal," associations were lawfully organized with power to regulate marketing. Although the enabling statutes were held *ultra vires* the federal government,[153] the flue-cured tobacco marketing association continued as a private regulatory agency. Composed of both growers and buyers of tobacco, the association fixed prices and restricted output. An exclusionary membership policy, coupled with association control of the auction, effectively relegated the few non-members to an inferior market position.

An investigation under the combines legislation[154] disclosed certain practices which were not in the public interest. However, recognizing the deeply rooted tradition of collective action by growers, the Restrictive Trade Practices Commission suggested:

If it is considered necessary that all producers and buyers should be regulated,

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[148]R.S.B.C. 1960, c. 150 (am. 1961, c. 19), s. 25. Apparently, however, arbitration is not in fact resorted to.

[149]Fishermen's Union Act, R.S.N.B. 1952, c. 89; Fisherman's Union Act, R.S.P.E.I. 1951, c. 61; Newfoundland Federation of Fishermen Act, S. Newf. 1951, c. 70.

[150]Fishermen's Federation Act, R.S.N.S. 1954, c. 103.

[151]"Nothing in the *Combines Investigation Act* or in section 411 of the *Criminal Code* shall be construed to apply to any contract, agreement or arrangement between fishermen or associations of fishermen in British Columbia, and persons or association of persons engaged in the buying or processing of fish in British Columbia, relating to the prices, remuneration or other conditions under which fish will be caught and supplied to such persons by fishermen between the 1st day of January 1959 and the 31st day of December, 1964." S.C. 1962–63, c. 4, s. 1 (originally S.C. 1959, c. 40; am. 1960, c. 45; 1960–61, c. 42). See [1962–3] 2 *Debates of the House of Commons* 1863–76 for an account of the inquiry and the exculpatory legislation.

[152]See *Canadian Fishing Co.* v. *Smith*, [1962] S.C.R. 294.

[153]*A.G.B.C.* v. *A.G. Canada* (*Reference re Natural Products Marketing Act*), [1937] A.C. 377 (P.C.).

[154]R.T.P.C., *Report Concerning the Production, Purchase and Sale of Flue-Cured Tobacco in Ontario* (1956); cf. Note, "Antitrust Problems Raised by Private Regulation of Auctioning of Leaf Tobacco (1957–58), 106 *U. Pa. L. Rev.* 568.

as is clearly contemplated by the present arrangements of the Association, then the only course would appear to be for the growers to secure governmental authorization for the appropriate control measures. . . . [W]e think that the Association should approach the Farm Products Marketing Board of Ontario so that study may be made of the form of statutory marketing agency which would be best adapted to the needs of the flue-cured tobacco industry. . . .[155]

The association followed this suggestion, underwent corporate metamorphosis, and emerged as a provincial marketing board elected by producers and armed with sweeping statutory powers.[156] Today, its policy remains exclusionary, despite the challenge of those excluded,[157] and its practices remain the subject of criticism.[158] Legally, however, concerted selling practices by tobacco farmers now are beyond the reach of the combines policy, especially since "provincial" marketing boards have been constituted federal agencies.[159]

The tobacco marketing experience conjures up the possibility of provincial intervention to validate and, indeed, enforce group buying or group selling, not only in the agricultural commodity market but in a variety of other situations which seem to warrant collective action: dealings between oil companies and the economically vulnerable lessees of their gasoline stations; small retailers confronted by monopolistic or oligopolistic suppliers; truck owners with minimal individual bargaining power. The policy implications of such legislative action, and the institutional alternatives available, raise fundamental issues of political and economic importance.

Thus, what began as a threshhold constitutional issue in effect becomes a central policy theme: to what extent should dependent contractors be governed by the régime of competition, to what extent by the régime of collective action?

IV. WHITHER THE DEPENDENT CONTRACTOR?

This study began with the premise that unequal power is undesirable. The undoubted achievement of collective bargaining in enhancing the economic and social position of organized employees[160] and in curbing the grosser forms of industrial autocracy suggests that the use of countervailing

[155]*Op. cit. supra* n. 154, at p. 142.

[156]Farm Products Marketing Act, R.S.O. 1960, c. 137, am. S.O. 1962–63, c. 45, empowers the board to refuse to grant a licence to produce tobacco "for any reason that the Board deems proper"; to fix and allot production quotas (or to refuse to do so) "for any reason that the Board deems proper"; and to prohibit the production or marketing of tobacco grown without a licence or quota. Enforcement powers (including the right to destroy illegal crops) are also created.

[157]*Robbins* v. *Ontario Flue-Cured Tobacco Growers Marketing Board* (1963), 41 D.L.R. 2d. 107 (S.C.O.), aff'd. (1964), 43 D.L.R. 2d. 413 (C.A.) (leave to appeal to S.C.C. granted April 28, 1964).

[158]Stinson (Chmn.), *Report, Ontario Flue-Cured Tobacco Industry Inquiry Committee* (Ont., 1964), at pp. 5–8 ff.

[159]Interdelegation of powers was upheld in *P.E.I. Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392. See now Agricultural Products Marketing Act, R.S.C. 1952, c. 6.

[160]There are, of course, groups of persons who are clearly employees, whose right to organize for collective action is neither permitted nor forbidden by legislation: professional employees, agricultural workers, government employees.

power by groups other than employees may be desirable. One group which may well require such power is the dependent contractors. The decision to permit or encourage the use of countervailing power however, raises a host of fundamental questions. To what groups should this device be permitted? What tactics may legitimately be employed in wielding group power? What rights do non-members of the group have to refrain from joining, and what rights do members have to continue to belong? What assurances exist that the balance of power will not become overweighted in the other direction, or that the public will ultimately be better served? These questions lie beyond the scope of this study which has been concerned with existing legal problems rather than long-range policy implications. Moreover, to attempt to answer them by a single proposal would be to ignore the need for differentiated solutions fashioned in the context of economic and sociological facts. Instead, what can profitably be explored are the short-range institutional devices available through which intelligent working solutions may be tested to resolve existing legal anomalies and ambiguities.

As has been suggested, the dependent contractor who sells services doubly disrupts the labour market. On the one hand, he competes with organized employees for available work; on the other hand, his attempts to organize for collective action, lacking statutory sanction, are often characterized by economic force and legal reprisals. Any rationalization of this labour market disorder must begin with abandonment of the traditional legal distinction between employees and independent contractors. Indeed, such a step would be warranted solely on the ground that the legal tests are uncertain:

> A contractor may go forth in the morning proud of his independence and return at nightfall a servant, some court having found in the employer such a measure of control of prices, of working conditions, of what not, as no truly independent contractor could countenance. Or a servant may suddenly find that he has so far departed, in thought, in time or space from "the scope of his employment" that he has achieved, at least temporarily, the estate of an independent contractor. It is all very confusing.[161]

But, as has been suggested, there are more socially important grounds for abandoning the legal distinction than mere uncertainty or confusion. The legal distinction simply does not conform to economic reality.

Insofar as dependent contractors share a particular labour market with employees, it is submitted, first, that they should be eligible for unionization. Such a result would require a new definition of the term "employee," perhaps along the lines of that adopted in Sweden: "For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person and thereby occupies in relation to that person a position of dependence essentially

[161] Steffen, "The Independent Contractor and the Good Life" (1935), 2 *U. Chi. L. Rev.* 501 at p. 502.

similar to that occupied by an employee in relation to his employer."[162] Second, courts and labour boards dealing with attempts by organized employees to immunize themselves from the impact of competition from dependent contractors should view this objective realistically. Union standards are as vulnerable to attack from dependent contractors as from non-union employees. Particularly when the law does not yet permit the union to organize the former as it may the latter, defensive and exclusionary tactics should be given some latitude.[163] In this respect the three British Columbia cases—*Morrison*,[164] *Scarr*,[165] and *Therien*[166]—should not be followed.

Where, on the other hand, the dependent contractor does not share a labour market with employees, existing labour relations institutions afford little assistance. Here, special legislation may be required, a precedent for which exists in the Nova Scotia fishing industry.[167] Whether under the aegis of such legislation, or without regard to it, organizations of dependent contractors have emerged. As has been suggested, their legal immunities are far from clear, and require legislative definition. At a minimum, the innocuous section 4 of the Combines Investigation Act should be recast so as to read at least as broadly as section 6 of the Clayton Act:

> [T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.[168]

The problem of creating specific exemptions for individual industries or occupations will be discussed below.

Collective action by dependent contractors in the product market presents even more difficult institutional problems. In the labour market, collective bargaining is a going concern. Expanding its scope to include dependent contractors can largely be accomplished by adapting existing institutions. In the product market, however, only primary producers—farmers and fishermen—have a real history of acting in concert, and in the agricultural commodity market small unit size and excess production minimize the likelihood of public injury. No device exists for extending collective bargaining to other

[162] Act Respecting Collective Agreements, s. 1.; Act Respecting the Labour Court, s. 1; Act Respecting the Right of Association and the Right of Collective Bargaining, s. 1, reproduced in Schmidt, *op. cit. supra* n. 1, appendices 1–3.

[163] See e.g. *Local 24, I.B.T. v. U.S.*, *supra*, n. 64, upholding the right of a union representing employee drivers to require an employer to bargain over amount to be paid as rental for trucks leased from an owner-operator, where rental payments had been used as a means of circumventing collectively negotiated wage scales.

[164] *Supra* n. 49.

[165] *Supra* n. 53.

[166] *Supra* n. 56.

[167] Fishermens' Federation Act, *supra*, n. 131.

[168] *Supra* n. 98.

groups, except for the marketing co-operative. Indeed, it may be difficult to ascertain whether a particular dependent contractor is to be governed by product market or by labour market rules. Peddlers may be indistinguishable from employed commission salesmen; truck-owners paid on a per load basis closely resemble employees paid on a piecework basis. Yet peddlers and truck owners now appear to be forbidden by the combines legislation to agree among themselves to restrict competition, while commission salesmen and employee truck drivers are not.

However, given a policy determination to transfer a group of dependent contractors from the régime of competition to the régime of collective action, at least three alternative approaches are possible. First, broad statutory exemptions might be provided for such sectors of the economy as primary producers. This would merely make explicit what is already implicit in much of the marketing legislation.[169] Second, a series of *ad hoc* antitrust exemptions for specific industrial situations might be legislatively created, as has been done in recent years in the British Columbia fishing industry. Such exemptions might be coupled with affirmative provisions for institutionalizing collective negotiations. Third, instead of legislative exemptions—with their overtones of political favouritism—administrative "licensing" of collective action might be preferable. The Restrictive Trade Practices legislation of the United Kingdom,[170] unlike our own, does not visualize an automatic congruency between competition and the public interest. Instead, all restrictive agreements are tested by an impartial tribunal for their impact on the public interest; where the agreements meet one of several tests, competition may be displaced by some form of restrictive practice. Two such tests are clearly premised on the necessity of concerted countervailing power to permit the survival of independent business units:

> . . . a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the [Restrictive Trade Practices] Court is satisfied of any one or more of the following circumstances, that is to say—
>
> (c) that the restriction is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition . . .
>
> (d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods . . . or who . . . controls a preponderant part of the market for such goods.[171]

Such an approach, of course, passes beyond the dependent contractor[172]

[169]Cf. Capper Volsted Act, 42 Stat. 388, 7 U.S.C.A., s. 291 (1922) (declares legality of agricultural and horticultural producing and marketing co-operatives); Fisheries Co-operative Marketing Act, 48 Stat. 1213; 15 U.S.C.A., s. 521 (1934), (declares legality of fish marketing co-operatives).

[170]Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. II, c. 68).

[171]Section 21(1). See generally Wilberforce, *Restrictive Trade Practices* (1957), at pp. 383 ff.

[172]One author has suggested: "[The independent contractor] is small businessman incarnate, the last stubborn refuge of rugged individualism." Steffen, *op. cit. supra*, n. 61, at p. 518.

to encompass business units of various sizes, enjoying the fullest autonomy. Selective enforcement of the régime of competition would represent a radical departure from the traditional Canadian and American "rule of law" where combination is *per se* an offence;[173] it might (in Canada, at least) pose serious constitutional problems. It is in no sense a short-range solution.

None the less, there is a case to be made for considering the encouragement of countervailing power even at the cost of sacrificing some competition. Countervailing power may be the last bastion of small-scale, individual enterprise. The continued existence of such enterprise, in the face of the irresistible attractions of bigness and the economies of scale, can be justified on both social and economic grounds. On the one hand, it is a check upon the unbridled economic power of monopoly and oligopoly. On the other hand, and perhaps more important, the dwindling of independent business enterprise represents "a serious loss in citizenship."[174] The disappearance of decentralized decision-making, the attrition of the species of proprietor who historically often provided local political and social leadership, have serious implications.

Of course, as has been noted, concerted business activity carries substantial risks. It may insulate businessmen from pressures for innovation or expansion; it may shelter inefficient producers. Almost certainly, it will result in prices somewhat higher than active competition would produce. On the political and social level, decentralized decision-making may frustrate attempted solutions to national problems, and local leadership may prove parochial or isolationist. The dependent contractor's plight forces us to consider the difficult task of weighing up these risks and advantages.

State intervention offers an alternative to countervailing business power. It is an alternative which has been rejected on the labour market in favour of collective bargaining. Whether it is a preferable alternative is not the burden of this study; what is important is that we seek out and consider institutional arrangements for redressing the unequal distribution of private power.

[173]Kilgour, "Restrictive Trade Practices" (1961), 4 *Can. B. J.* 116.
[174]*Standard Oil of California* v. *U.S.* (1949), 337 U.S. 293 at p. 319, *per* Douglas J.

APPENDIX C

O.L.R.B. DECISIONS INVOLVING
THE DEPENDENT CONTRACTOR PROVISIONS

1. Seven-Eleven Taxi Ltd., [1976] O.L.R.B. Rep. 134.
2. Toronto Drywall Services, [1976] O.L.R.B. Rep. 645.
* 3. Nelson Crushed Stone, [1977] O.L.R.B. Rep. 104.
* 4. Adbo Contracting, [1977] O.L.R.B. Rep. 197.
* 5. Indusmin Ltd., [1977] O.L.R.B. Rep. 552.
* 6. Canada Crushed Stone, [1977] O.L.R.B. Rep. 806.
* 7. Superior Sand, Gravel & Supplies, [1978] O.L.R.B. Rep. 119.
* 8. Dufferin Aggregates, [1978] O.L.R.B. Rep. 278.
* 9. Consolidated Sand & Gravel, [1978] O.L.R.B. Rep. 264.
* 10. Sherman Sand & Gravel, [1978] O.L.R.B. Rep. 459.
* 11. Flintkote Co. of Canada, [1978] O.L.R.B. Rep. 822.
12. Comfort Guard Services, [1978] O.L.R.B. Rep. 905.
* 13. Giordano Sand & Gravel, [1978] O.L.R.B. Rep. 989.
14. Dominion Dairies, [1978] O.L.R.B. Rep. 1083.
* 15. Indusmin Limited, [1979] O.L.R.B. Rep. 213.
16. Western Dispatch Inc., [1979] O.L.R.B. Rep. 362.
17. Century Flooring Limited, [1979] O.L.R.B. Rep. 737.
18. Blue Line Taxi, [1979] O.L.R.B. Rep. 1056.
* 19. Crawford Sand and Gravel, [1980] O.L.R.B. Rep. 309.
20. Niagara Veteran Taxi, [1980] O.L.R.B. Rep. 337.
* 21 A. Cupido Haulage, [1980] O.L.R.B. Rep. 679.
22. Ambler-Courtney Ltd. O.L.R.B., March, 1980, Unreported.
** 23. Craftwood and Coreydale, [1980] O.L.R.B. Rep. 1613.

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*Cases involving aggregate-producing industry.

**Cases involving roadbuilding or construction industries.

APPENDIX D

RECORD OF MEETINGS AND PARTICIPANTS

March 15, 1980 — Meeting with the Aggregate Producers Association of Ontario at A.P.A.O. offices in Downsview.

Representatives:

Mr. G.E. Armstrong, General Manager
Mr. R.P. Cook, Assistant General Manager
Mr. N. Flemington, Sherman Sand and Gravel Ltd.
Mr. L.J. Racioppa, Repac Construction and Materials Ltd.
Mr. C.C. Moyer, Standard Aggregates Ltd.
Mr. A.H. Morrison, Indusmin Ltd.
Mr. E.V. Drury, King Paving and Materials Ltd.
Mr. F.J. Dewitt, Dufferin Aggregates Ltd.
Mr. E.T. McDermott, Counsel

March 27, 1980 — Meeting at Osgoode Hall Law School with Mr. F.J. Dewitt, Dufferin Aggregates Ltd. and Mr. W.S. Cook, Counsel.

March 29, 1980 — Meeting with the Ontario Trucking Association at O.T.A. offices in Rexdale.

Representatives:

Mr. J. Nickell, O.T.A.
Mr. J. Butler, O.T.A.
Mr. S. Flott, O.T.A.
Mr. P. Hodge, Peter Hodge Transport Ltd.
Mr. W. Johnson, Barlin Carriers Inc.
Mr. B. Kelly, National Slag Ltd.
Mr. C. Arsenault, Claire's Haulage Ltd.
Mr. B. Grant, Grant Haulage Ltd.

April 1, 1980 — Meeting at The Royal York Hotel, with Mr. W.A. Graham, South Winds Sand and Gravel Ltd., and Mr. W.A. Webb, T.C.G. Materials Ltd.

April 19, 1980 — Meeting at Osgoode Hall Law School with the following representatives of King Paving and Meterials Ltd.

Representatives:

Mr. H.P. Wilson, Vice-President, Materials
Mr. D.O. Ashwell, Operations Manager
Mr. E.V. Drury, Director of Public Relations
Mr. D. Barnes, Manager Employee Relations

April 19, 1980 — Meeting at Osgoode Hall Law School with Mr. Torres of Torres Transport Ltd. and Mr. G. Tokar, Counsel.

May 3, 1980 — Meeting at Osgoode Hall Law School with Mr. W. Griffiths, Milton Limestone, Wilbroy Mines Ltd.

May 5, 1980 — Meeting with the Ontario Sewer and Watermain Contractors Association at O.S.W.C.A. offices in Mississauga.

Representatives:

Mr. R.J. Smith, President
Mr. C. Delion, Executive Director
Mr. G. McCann, Secretary
Mr. D. Fryzuk, Labour Relations
Mr. S. Bernardo, Counsel

May 10, 1980 — Meeting at Osgoode Hall Law School with the following representatives of the Teamsters Construction Council of Ontario:

Mr. A. Marinelli, Canadian Conference of Teamsters
Mr. C. LaCombe, Local Union 230, Business Representative
Mr. G. Wilkes, Local Union 230, Business Representative
Mr. M. Elliot, Local Union 879, Business Representative
Mr. E. Winegarden, Vice-President, Local Union 101, Business Representative
Mr. H. Caley, Counsel

May 23, 1980 — Meeting at Osgoode Hall Haw School with Mr. D. Hicks, Gormley Sand and Gravel Ltd.

May 30, 1980 — Meeting with the Ontario Road Builders Association at O.R.B.A. offices in Downsview.

Representatives:

Mr. V.P. Raponi, President
Mr. H.E. Macpherson, Vice-President
Mr. R.T. Patterson, Executive Vice-President
Mr. M.F. Macdonald, General Manager
Mr. S.E. Dinsdale, Counsel

June 5, 1980 — Second meeting with the Ontario Trucking Association/ Ontario Aggregate Carriers Association at O.T.A. offices in Rexdale,

Representatives:

Mr. J. Nickell, O.T.A.
Mr. J. Butler, O.T.A.
Mr. S. Flott, O.T.A.
Mr. G. Beech, O.T.A.
Mr. P. Hodge, Peter Hodge Transport Ltd.
Mr. C. Arsenault, Claire's Haulage Ltd.
Mr. A. Cupido, A. Cupido Haulage Ltd.
Mr. A. Wright, A. Wright Ltd.
Mr. W. Buckham, Buckham Transport Ltd.
Mr. J.D. Coverdale, J.D. Coverdale Ltd.

June 19, 1980 — Meeting with Ontario Ministry of Transportation and Communication, at the Ministry's Downsview offices.

Representatives:

Mr. J.M. Dykstra, Carrier Policy and Reciprocity
Mr. J.R. Jackson, Carrier Policy and Reciprocity
Mr. D. Hopper, Contract Control
Mr. J.A. Wardrop, Ontario Highway Transport Board
Mr. J. Donnelly, Highway Carrier Licensing
Mr. T. Smatylo, Program Development

June 26, 1980 — Meeting at Sudbury with Mr. M. Dumontelle, Greater Northern Trucking Association with Mr. R. Parisé, Counsel

June 26, 1980 — Meeting at Sudbury with Mr. M. Ethier, Ethier Sand and Gravel Ltd.

July 17, 1980 — Meeting at Maple with Mr. M.K. Roberts, Superior Sand, Graven and Supplies Ltd. and Mr. B.F. MacDonald, Currie, Coopers and Lybrand Ltd.

July 17, 1980 — Meeting at Don Mills with Mr. J. Cameron Nelson, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, Business Agent.

July 17, 1980 — Meeting with the United Cement, Lime and Gypsum Workers International Union at the union's Toronto Solicitor's office.

Representatives:

Mr. D.G. Burshaw, Canadian Vice-President
Mr. E.K. Mattocks, District Representative
Mr. E.A. Batten, District Representative
Mr. A. Natale, International Representative
Mr. J.K.A. Hayes, Counsel
Mr. F. Luce, Student at Law.

July 24, 1980 — Meeting at Mississauga with Mr. E.W. Grier, The Canadian Salt Company Ltd., Regional Distribution Manager for Ontario.

July 30, 1980 — Meeting at Oakville with Mr. R.G. Island, Island Transport Ltd.

APPENDIX E

INQUIRY NOTICE PUBLISHED

IN THE DAILY COMMERCIAL NEWS

JANUARY 9, 10 and 11, 1980

Notice to the Aggregate Producing Industry and to the Road Building Industry

The Industrial Inquiry Commission appointed to report to the Minister of Labour concerning the application of the dependent contractor provisions of the Ontario **Labour Relations Act** in the Aggregate Producing and Road Building Industries invites persons interested in contributing to its inquiry to write to the Commission Secretary, Ms. Eva Heilimo, Osgoode Hall Law School, York University, 4700 Keele St., Downsview, Ontario M3J 2R5 (416-667-3482) advising her generally of the nature of their interest in the inquiry.

The Commission contemplates providing opportunities for all interested parties to meet with the Commission as well as inviting written briefs, but the details of the inquiry procedure will be developed in light of the number of persons interested in participating and the nature of their interest.

Ontario Ministry of Labour

Industrial Inquiry Commission
Dependent Contractors

S. R. Ellis.

APPENDIX F

Written submissions were received by the Inquiry from the following organizations:

1. Spratt Sand & Gravel Ltd.
2. Burlington Paving Co. Ltd.
3. Ruddock Paving Company Ltd.
4. A group of 15 owner/operators in the area of Haldimand-Norfolk.
5. Marsh Paving Ltd.
6. Nelson Crushed Stone
7. Greater Northern Trucking Association
8. The Teamsters Construction Council of Ontario
9. The Aggregate Producers Association of Ontario. (Brief endorsed by the Ontario Trucking Association)
10. The Ontario Aggregate Carriers Association.
11. Golden, Levinson on behalf of the United Cement, Lime, and Gypsum Workers International Union.

As will be seen from Appendix D, some of the foregoing organizations also made oral submissions. As well, during the meetings referred to in Appendix D, I was provided with numerous documents which in a particular case taken together might be considered to amount to written submissions. I have limited the list in this Appendix F to those written submissions which may be found in the Inquiry's files in letter or brief form.

APPENDIX G

BIBLIOGRAPHY

1. Reports and Studies

(a) Report of Mr. Justice W.D. Roach, September, 1958, Royal Commission re: Individual Dump Truck Owners Association and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

(b) Laskin, Report of Committee of Inquiry into the Industrial Standards Act, 1963.

(c) The Report of the Task Force on Labour Relations - H.D. Woods, Chairman, December, 1968.

(d) The Ministerial Inquiry into the Dump Truck Industry, 1975 - M.L. Rapoport, Q.C., Commissioner.

(e) A Policy for Mineral Aggregate Resource Management in Ontario, A Report to the Ministry of Natural Resources, 1976.

(f) 1976 Interim Report of the Select Committee on Highway Transportation of Goods.

(g) The 1977 Final Report of the Select Committee on the Highway Transportation of Goods, Part VI.

(h) Ontario Highway Transport Board Report on Procedures and Policies for the Regulation of Class "R" Operations, 1979.

(i) Report of the Commission of Enquiry into the P.E.I. Fisher, January, 1981.

2. Articles

(a) Arthurs, The Dependent Contractor: A Study of the Legal Problems of Countervailing Power, 1965, 16 University of Toronto Law Journal 132. (See Appendix B of this Report.)

(b) Labour Relations Law, Cases, Materials and Commentary. Compiled by a group of teaches of Labour Relations Law known as The Labour Relations Law Casebook Group. Second Edition, Industrial Relations Centre, Queen's University, Kingston, Ontario, 1974.

(c) Blouin, Le Rapport de Dependence au Code du Travail Portant sur la Relation Individuelle de Travail, 1974, 20 McGill Law Journal 429.

(d) Steinberg, the Legal Problems in Collective Bargaining by Canadian Fishermen, October, 1974, Labour Law Journal 643.

3. Statutes

(a) The Labour Relations Act, R.S.O. 1970, c. 232 as amended, sections 1(1)(ga), 1(1)(gb) and 6(4).

(b) Canada Labour Code, R.S.C., c. L-I, Part V.

(c) Labour Code of British Columbia, S.B.C. 1973, c. 122.

(d) Manitoba Labour Relations Act, S.M. 1972, c. 75, section 1(i).

(e) Labour Relations Act, 1977, S.N. 1977, c. 64, sections 1(m) and 40.

(f) Nova Scotia Trade Union Act, S.N.S. 1972, c. 19, s. 1(k).

(g) The Trade Union Act, R.S.S. 1978, c. T-17, section 21(f)(ii) and (iii), 2(g)(iii).

(h) Quebec Transport Act, 1972, c. 55, Bulk Trucking Regulation, O.C. 2079-77, 22 June 1977, Reg. 77-356, 27 June 1977.

(i) Public Commercial Vehicles Act, R.S.O. 1970, c. 375 as amended, section 6(3) of PCO Act, R.S.O. 1970, c. 375 as amended by S.O. 1975 (2nd Sess.) c. 7, section 2(3).

(j) Ontario Highway Transport Board Act, R.S.O. 1970, c. 316 as amended.

(k) Industrial Standards Act, R.S.O. 1970, c. 221.

4. Cases

(a) For O.L.R.B. Decisions applying Dependent Contractor Provisions, see Appendix C.

(b) Hearst v. N.L.R.B. (1944), 322 U.S. 111.

(c) Re Application of Lunenburg Sea Products Re Zwicker (1947-48), 21 M.P.R. 305 (N.S.S.C. in banco)

(d) Therien v. Teamsters (1958), 13 D.L.R. 2d 347 (B.C.S.C.); aff'd. (1959), 16 D.L.R. 2d 646 (B.C.C.A.); aff'd [1960] S.C.R. 265.

(e) Livingstone Transportation Ltd., [1972] O.L.R.B. Rep. 488.

(f) Fownes Construction Co., [1974] 1 C.L.R.B.R. 453 (B.C. Lab. Rel. Bd.).

(g) Fownes Construction Co., [1974] 1 C.L.R.B.R. 510 (B.C. Lab. Rel. Bd.).

(h) Midland Superior Express Ltd., [1974] 1 C.L.R.B.R. 267 (Can. Lab. Rel. Bd.).

(i) District of North Cowichan, [1974] 1 C.L.R.B.R. 434 (B.C. Lab. Rel. Bd.).

(j) Livingston Transportation Ltd., [1975] O.L.R.B. Rep. 705.

(k) Vancouver Printing Specialties, [1975] 1 C.L.R.B.R. 193 (B.C. Lab. Rel. Bd.).

(l) Vancouver Resources Board, [1977] 1 C.L.R.B.R. 358 (B.C. Lab. Rel. Bd.).

(m) Pacific Press, [1977] 1 C.L.R.B.R. 342 (B.C. Lab. Rel. Bd.).

(n) The Board of the Parkland School Unit, No. 63, [1978] 2 C.L.R.B.R. 489 (Sask. Lab. Rel. Bd.).

(o) Meyer v. Lavigne (1979), 27 O.R. (2d) 129 (C.A.).

5. Briefs and Submissions

(a) Submissions to this Inquiry - See Appendix F.

(b) Brief presented to the Ontario Highway Transport Board on March 12, 1979, by Sudbury Trucking Association.

(c) Submissions of the Aggregate Haulers Associations of Ontario to the Select Committee on Highway Transportation of Goods, July 15, 1976.

(d) Resume of Notes of Presentation to Select Committee on Highway Transportation of Goods on August 10, 1976 by Sudbury Trucking Association.

(e) Supplementary Submission by the Aggregate Haulers Association of Ontario and the Dump Truck Owners Division of the Ontario Trucking Association to the Select Committee on the Highway Transportation of Goods, January 21, 1977.

(f) Brief presented to Hon. John R. Rhodes, Minister of Transportation and Communications on behalf of the following groups:

1. Niagara Regional Aggregate Haulers Association
2. Hamilton and Area Aggregate Haulers Association
3. Greater Ottawa Truckers Association
4. Essex County Aggregate Haulers Association
5. South Porcupine Truckers Association
6. Sudbury and District Truckers Association, (May 21, 1974)

(g) Basic Outline of Presentation to the Premier on the Impact of the Labour Relations Amendment Act, 1975 on the Dump Truck Industry in Ontario - Ontario Trucking Association Brief.

(h) Brief to the Ministry of Labour and Ontario Labour Relations Board presented by:

Niagara Regional Haulers Association
Hamilton Aggregate Haulers Association
Sudbury and District Truckers Association
Greater Ottawa Truckers Association
Kingston Truckers Association
Belleville Truckers Association
Cambridge Dump Truckers Association
Essex County Aggregate Haulers Association
Toronto, York, Durham Truckers Association
South Porcupine Truckers Association, (January 13, 1975)

Briefs and Submissions (Continued)

(i) Brief presented to the Standing Committee on Finance, Trade and Economic Affairs of the House of Commons on Bill C-2, The Competition Bill, on behalf of the following groups:

Niagara Regional Aggregate Haulers Association
Hamilton Aggregate Haulers Association
Sudbury and District Truckers Association
Greater Ottawa Truckers Association (November 28, 1974)

(j) Submission to the Standing Committee on Highways and Transport of the Legislature of Ontario by the Greater Ottawa Truckers Association, May, 1968.

(k) Submission to the Royal Commission Inquiry into Labour Disputes by the Automotive Transport Association of Ontario, March 3, 1967.

(l) Submission for the consideration of the Hon. John Yaremko, Q.C., M.P.P. Minister of Transport, presented by:

The Aggregate Producers Association of Ontario
The Automotive Transport Association of Ontario
The Individual Dump Truck Owners Association of Ontario
The Ontario Road Builders Association
The Toronto and District Excavators Association (April 13, 1959)

6. Miscellaneous

Labour Relations Amendment Act 1975, Bill 111, Background Material.

Ontario Ministry of Labour, Proposed Amendments to the Labour Relations Act 1975.

SUMMARY OF PART II OF THE REPORT OF THE INDUSTRIAL INQUIRY COMMISSION CONCERNING THE APPLICATION OF THE DEPENDENT CONTRACTOR PROVISIONS OF THE LABOUR RELATIONS ACT

Part II of the Commission's Report was released by Professor Ellis on September 25th. The second part deals specifically with the application of the dependent contractor provisions to dump truck owner/operators in the roadbuilding industry.

As in the case of the aggregate-producing industry, Professor Ellis has determined that there is a sufficient potential for exploitation of owner/operators in the roadbuilding industry to warrant some form of legislative protection. The Commission concludes, however, that the existing provisions are inappropriate to protect the interests of owner/operators in this industry.

In Part I, it was indicated that a majority of owner/operators obtain work as part of a regular pool of drivers utilized by a particular aggregate producer. Business patterns in the roadbuilding industry differ significantly. It is not uncommon for owner/operators to routinely work for a number of contractors. Certain owner/operators do develop long-term relationships with some of the larger roadbuilding contractors. The Commission notes, however, that unlike the aggregate-producer, the site of a roadbuilder's work is constantly shifting and, to a much greater extent than the aggregate-producer, the roadbuilder's trucking requirements are affected by his individual success in competing for a limited number of contracts. Therefore, even those owner/operators who form part of roadbuilder's regular pool of drivers will typically work for a number of contractors in addition to their main customer.

The Report refers to recent jurisprudence of the Labour Relations Board which limits the concept of dependent contractor to owner/operators who derive a substantial proportion of their total income from a single source. The Commission concludes that this requirement effectively denies access to the collective bargaining process to a substantial number of owner/operators. Apparently, not a single bargaining agent has been certified to represent owner/operators in the roadbuiding industry.

The Commission considers and rejects the establishment of a regime of "co-operative collective bargaining" in which owner/operators, whether dependent or not dependent, could be included in bargaining units of drivers directly employed by roadbuilders or trucking firms. It is the Commission's view that the conflict in bargaining objectives between entrepreneur and employed driver would be insurmountable.

Ultimately, the Commission recommends the creation of a collective marketing scheme for the roadbuilding industry similar to that proposed in Part I in respect to the aggregate producing industry. In fact, it is suggested that an integrated

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marketing scheme should be developed encompassing both industries. The Commission, however, recognizes the difficulty inherent in a single marketing scheme given the commitment of owner/ operators to one or other of the industries.

Finally, departing from its terms of reference, the Commission submits that ideally the collective marketing scheme should apply to all dump truck owner/operators active in the construction industry generally.

DUMP TRUCK OWNER/OPERATORS AND COLLECTIVE BARGAINING

A Report to the Ministry of Labour Concerning the Application of the Ontario Labour Relations Act Dependent Contractor Provisions to Dump Truck Owner/Operators in the Aggregate-Producing and Roadbuilding Industries

PART II

S.R. Ellis, Q.C.
Osgoode Hall Law School
York University

September, 1981

PART II

THE ROADBUILDING INDUSTRY

TABLE OF CONTENTS

PREFACE

CHAPTER I - THE APPROPRIATENESS OF THE DEPENDENT CONTRACTOR PROVISIONS IN THE ROADBUILDING INDUSTRY

A. Roadbuilding Owner/Operators as Dependent Contractors

B. The Application of the Dependent Contractor Provisions

C. Conclusion

CHAPTER 2 - CO-OPERATIVE COLLECTIVE BARGAINING AS A POSSIBLE SOLUTION IN THE ROADBUILDING INDUSTRY

A. Introduction

B. The Problems

CHAPTER 3 - THE APPLICATION OF THE COLLECTIVE MARKETING SCHEME IN THE ROADBUILDING INDUSTRY

A. Conclusion

B. Impact of Marketing Scheme on Collective Bargaining of Employed Drivers

C. Special Considerations in the Roadbuilding Industry

D. Integration with the Aggregate-Producing Industry

E. Relationship of the Marketing Scheme to the Construction Industry, and to the Owner/Operator Dump Truck Industry Generally

PREFACE

Part II of my report is a continuation of a study, the bulk of which is to be found in Part I. Part II cannot be understood without the context provided by Part I and is intended to be read in conjunction with Part I.

CHAPTER I

THE APPROPRIATENESS OF THE DEPENDENT CONTRACTOR PROVISIONS IN THE ROADBUILDING INDUSTRY

A. Roadbuilding Owner/Operators as Dependent Contractors

In turning now to consider the particular aspects of the roadbuilding industry, I start with the conclusion that owner/operators in the roadbuilding industry, like owner/operators in the aggregate-producing industry, are dependent contractors as defined by Professor Arthurs. They are not employees in the common law sense of the term, but are as exploitable as though they were employees. The analysis in Part I in connection with the exploitive potential of owner/operators in the aggregate producing industry applies equally to owner/operators active in the roadbuilding industry.

B. The Application of the Dependent Contractor Provisions

It is not possible, of course, to speak with too much confidence about the application of the dependent contractor provisions of the Labour Relations Act in the roadbuilding industry since as far as I am aware there is no case in which a union has been certified as a bargaining agent for dependent contractors working in the roadbuilding industry. The Craftwood and Coreydale case[1], which is the only decision of the Ontario Labour Relations Board dealing with the application of the dependent contractor provisions to owner/operators of dump trucks not employed in the regular pools of producers in the aggregate-producing industry, may well have included amongst the applicants and/or respondents, owner/operators or contractors active in the roadbuilding industry, but the report does not make it clear as to the kind of work in which the respondents in that case were engaged.

Craftwood and Coreydale is of importance, however, in considering the

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[1] [1980] OLRB Rep. 1613.

roadbuilding industry because it dealt with owner/operators of dump trucks whose pattern of business involved routinely working for a number of contractors. This pattern is in sharp contrast to the business patterns of owner/operators in the aggregate producers' regular pools but is, I understand, a typical business pattern for most owner/operators active in the roadbuilding industry.

An exception to that pattern is the regular pool of owner/operators who develop long-term relationships with some of the larger roadbuilding contractors and who follow that contractor from job to job. I have been unable to obtain any information as to how common this latter practice might be but I am told it is not unusual. Accordingly, in considering the application of the dependent-contractor provisions to the roadbuilding industry it is apparent that account will have to be taken of the side-by-side existence of a pattern on the one hand of dependency on one major customer similar to the dependency of regular pool truckers in the aggregate-producing industry, and on the other, of scattered relationships with a number of contractors.

It is apparent from the Craftwood and Coreydale decision that the dependent contractor provisions as they now stand will be available only to those owner/operators in the roadbuilding industry who are part of a roadbuilder's regular pool or who have amongst their list of customers one or more relatively regular customers from whom they may be seen to derive a substantial proportion of their total income.

At least one significant distinction between the regular pools in the road-building industry and the regular pools in the aggregate-producing industry is that in the roadbuilding industry, the owner/operators will not be faced with any significant competition from customer-arranged trucking. The competitors for dump truck work on a road project will be regular-pool owner/operators, non-pool owner/operators, contractor-owned trucks with employed drivers and

trucking companies.[2] Also absent from the roadbuilding industry picture is the competition between the single-axle and tandem equipment of owner/operators and the tractor-trailer equipment which in the aggregate-producing industry tends to be the exclusive preserve of the trucking companies.[3] My information concerning the roadbuilding industry, which I must acknowledge is less comprehensive and complete than is the case with respect to the aggregate-producing industry, leads me to believe that the opportunities for efficient use of tractor-trailer dumping equipment designed primarily for large tonnage, long-distance hauls would not represent a significant part of the trucking business in that industry. In saying that, I am categorizing the hauling of aggregate and asphalt to a road project from an aggregate pit or asphalt plant - work in which of course tractor-trailers will be active - as work in the aggregate-producing industry. The work of dump trucks in connection with a roadbuilding project excluding the hauling of aggregate or asphalt from a producer to the project would typically be confined to the hauling of excavated material or the movement of aggregate within the construction site. Competition for that work between regular-pool owner/operators of dump trucks and trucking companies will by and large involve trucking companies operating tandem (or single axle) equipment.

One would expect, given the economic advantages of owner/operators over trucking companies when the balancing factor of the tractor-trailer equipment is removed, to find that the employment of trucking companies on roadbuilding projects (not including the hauling of aggregate or asphalt from the producer to the site) is limited. I have no data that would substantiate that conclusion, but I would be surprised if it were not the case.

Thus, the regular pools which qualify for organization under the dependent

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[2]The reader should be reminded that I continue to use the special terms defined in Part I. For the definition of "trucking company", see Part I. p. 14.

[3]See Part I, p. 31.

contractor provisions of the Labour Relations Act will be predominantly competing with other owner/operators who are not part of the regular pool (including, of course, multi-truck owner/operators) and with the contractor's own trucks driven by his employees.

It follows then that the problems which I have outlined in respect of the aggregate-producing industry concerning the inappropriateness of a scheme of collective bargaining that benefits only a part of the owner/operator group at the expense of others[4] is especially pertinent in this industry, while at the same time the situation which in Professor Arthurs' view made the extension of the collective bargaining regime to dependent contractors particularly attractive - that is, where dependent contractors compete directly with employees - is realized to a much greater extent.

It may also be noted that in the roadbuilding industry the relationship of dependency of even regular-pool owner/operators with any particular roadbuilder is likely to be substantially more volatile than is the case in the aggregate-producing industry. Aggregate-producers provide to their regular pools constant (if erratic) employment over a long term at one location, and it is that which attracts and keeps owner/operators in those pools. But a roadbuilder's work site is constantly moving and may range throughout the Province. Furthermore, the level of a roadbuilder's trucking requirements will vary not only with the season and the weather and the general level of construction activity but also, to a much greater extent than is the case with aggregate-producers, with his individual success in competing for a limited number of roadbuilding contracts. It may be expected, therefore, that in the roadbuilding industry even a regular-pool owner/operator's business will typically involve work for a number of contractors in addition to his main customer and, as well, relatively frequent

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[4] See Part I, p. 57, et seq.

shifting of his dependent relationship(s) from one contractor to another.

In circumstances such as these it is readily apparent that dependency on one contractor as a basis for "employee" status for purposes of the Labour Relations Act simply cannot provide a reasonable footing for a viable collective bargaining regime, and the concept of dependency on a group of contractors as a basis for applying the Act not only seems of doubtful practicability on its merits but has, of course, already been rejected by the Labour Relations Board in its Craftwood and Coreydale decision.

C. Conclusion

It is in my view obvious, on the foregoing grounds alone, that the dependent contractor provisions in the Labour Relations Act cannot provide a useful or appropriate means for dealing with the potential for exploitation of owner/operators engaged in the roadbuilding industry.

CHAPTER 2

CO-OPERATIVE COLLECTIVE BARGAINING AS A POSSIBLE SOLUTION IN THE ROADBUILDING INDUSTRY

A. Introduction

At the time I completed Part I of this report, I was beginning to consider the possibility of solving the dependent contractor problem in the roadbuilding industry through a "co-operative" bargaining scheme in which unions would be authorized to organize combined units of employed drivers and owner/operators without regard to the existence of any dependency. Some of the factors which militated against union organization as an effective device in the aggregate-producing industry were either not present in the roadbuilding industry - for example, the alternative of customer-arranged trucking would not be a factor - or exhibited different aspects. The unfair competition aspect of allowing the organization of collective bargaining by owner/operators seems not as compelling, for instance, in an industry where trucking companies have traditionally competed on roadbuilding sites with significant numbers of union-organized employed truck drivers. And, of course, as already noted, the presence of significant numbers of employed drivers raises in the roadbuilding industry the problem with which Professor Arthurs was chiefly concerned when it came to dependent contractors competing directly for the same work as employees - viz., the debilitating impact on the employees' bargaining capacity of the existence of a body of non-organizable, competing workers.

For these reasons I thought for a time that the most fruitful alternative to the dependent contractor provisions in the roadbuilding industry might prove to be in effect a legislated extension of the collective bargaining regime in a different form to permit union-organized, co-operative, bargaining arrangements covering both owner/operators (dependent or not dependent) and employed drivers

wherever established bargaining units of employed drivers found themselves working side-by-side with owner/operators. I was considering in effect a version of the B.C. and Newfoundland approach.[5] In pursuance of that idea I have, since completing Part I, given considerable thought to the detailed mechanics as well as the specific implications of such a scheme and the upshot is that I am now convinced that it is not a sound idea.

B. The Problems

The most basic problem with the idea of a co-operative bargaining scheme is the fact that owner/operators have different bargaining agendas and different priorities than employed drivers and compete with employed drivers for the contractor's work.[6] It is much easier in those circumstances to say, as does the B.C. and Newfoundland dependent contractor provisions, that it will be a condition of certification for such a mixed unit that an appropriate process be established for ensuring that the interests of both groups are taken into account by the union in its bargaining with the contractor, than it is to actually devise such a process. Owner/operators in the roadbuilding industry as in the aggregate-producing industry are not employees masquerading as businessmen as has been the case with many categories of so-called independent contractors. As I said in Part I, dump truck owner/operators are legitimate entrepreneurs.[7] As a result, the differences and conflicts in the bargaining goals between owner/operators and employed drivers will be substantial and pervasive, and the job of a union attempting to represent both groups at the same time would be very difficult if indeed, in the long run, it were possible at all.

Another complication which it would be hard to accommodate in any practical

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[5] See Part I, p. 55.

[6] See the analysis of this problem in Part I, at p. 51, et seq.

[7] See Part I, pp. 51-56.

scheme of co-operative bargaining is the existence of a significant number of multi-truck owner/operators who are both owner/operators and employers.[8] As I have pointed out in Part I, any viable scheme for organizing owner/operators of dump trucks must not exclude multi-truck owner/operators.[9] Any co-operative bargaining scheme would therefore have to be structured so that multi-truck owner/operators are included in the bargaining unit. But a structure that accommodates that need is one that then raises the problem of how to protect the rights of employees of bargaining unit members. I do not say it could not be done, but I am satisfied after considering various possibilities that it is a complication that cannot be easily resolved. One might, for example, conceive of some type of two-way representation structure, with the union representing the multi-truck and single-truck owner/operators and the contractor's employees as against the contractor and representing the employees of the multi-truck owner/operators as against the multi-truck owner/operators, but the conflict of interest in which such an arrangement would place the union vis-à-vis the multi-truck owner/operators and their employees makes the long-term success of such a scheme problematic at best, even if the structural complexities could be made to work in other respects.

I appreciate that the B.C. Board by its decision in the second Fownes case allowing the inclusion of multi-truck owner/operators in a "mixed" bargaining unit[10] has in effect created a bargaining structure which it must expect will deal effectively with the various different interests which I have identified. However, after due consideration I simply cannot share the B.C. Board's apparent confidence in the long-term viability of a bargaining unit which encompasses

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[8] See Part I, p. 14.

[9] See Part I, pp. 59-61.

[10] Fownes Construction, [1974] 1 C.L.R.B.R. 510.

such a constellation of competing and conflicting interests.

CHAPTER 3

THE APPLICATION OF THE COLLECTIVE MARKETING SCHEME IN THE ROADBUILDING INDUSTRY

A. Conclusion

My conclusion is that in the roadbuilding industry the best way to prevent the exploitation of owner/operators while at the same time avoiding undermining effective collective bargaining for employed drivers is to allow owner/operators to be organized in a collective marketing scheme of the type outlined in Chapter 6 of Part I.

B. Impact of Marketing Scheme on Collective Bargaining of Employed Drivers

That a collective marketing scheme for owner/operators would also have a positive effect on the collective bargaining potential of employed drivers becomes apparent when one realizes that the problem which Arthurian dependent contractors traditionally present for effective collective bargaining by employees with whom they compete, arises most fundamentally not from the owner/operators' exclusion from the employees' bargaining unit but from the owner/operators' exploited status. It is the employer's access to an exploitable group of competitors - not the mere availability of competing alternatives - which unfairly undermines the union's bargaining position. The most natural solution and the one suggested by Professor Arthurs is to remove the potential for exploitation by allowing competing dependent contractors to be organized by the employees' union. But any scheme which removes the dependent contractor's potential for exploitation should solve the problem. Owner/operators who can no longer be exploited because of the strength of their collective marketing organization will no longer constitute a threat to the viability of the employed drivers' collective bargaining arrangements. Obviously, their availability as an alternative for the employer will continue to be influential in limiting the

union's bargaining potential but the removal of their potential for exploitation will make that a legitimate economic influence of a kind with which unions must expect to deal in various forms in the ordinary course of collective bargaining.

Also, once there is an active owner/operators' marketing organization, it should prove possible for unions to find some de facto basis for making common cause with such an organization in areas where their respective interests are common. In a strike situation, for example, it would be hardly surprising if the question of the owner/operators honouring picket lines became at least the subject of discussion between the union and the owner/operators' Marketing Agents in a particular region.[11] I believe such natural liaison would prove to be a constructive element in the overall picture and that the unions would find that the emergence of a vital owner/operators' organization would substantially increase the bargaining strength of both owner/operators and employed drivers - an increase which I am satisfied is amply justified given the long-standing nature of the exploitive environment which I believe now exists with respect to both groups.

C. Special Considerations in the Roadbuilding Industry

The structure of the collective marketing scheme which I would propose for the roadbuilding industry would be the same as that for the aggregate-producing industry, subject to some special arrangement to deal with the fact that in this industry there are numbers of owner/operators who are habitually more mobile in terms of the distances they will travel to the work site than is the case in

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[11] It occurs to me that co-operation between these two groups might be said to involve a common-law conspiracy or present some other legal difficulty. Should that possibility on further consideration prove to have substance, I would think it important to clear the way for such co-operation by whatever legislation may be indicated. Owner/operators and employed truck drivers share sufficient common problems and are engaged in a sufficiently similar activity as to make any artificial barriers between them both unrealistic and inappropriate.

the aggregate-producing industry. There are, I am told, regular pools of owner/operators in this industry who routinely follow a particular contractor from job to job across the Province. Given the regional nature of the proposed system of Marketing Agents, this aspect of the roadbuilding owner/operators' business will presumably require the development of some system of transference akin to the system that has developed amongst the craft unions in the construction industry.

D. Integration with the Aggregate-Producing Industry

Theoretically, at least, it would also seem to be sensible to provide for an integrated collective marketing scheme encompassing both the aggregate-producing and roadbuilding industries. In practical terms, there may be problems, at least in the short run, arising from the fact that individual owner/operators seem to be committed to one or other of the industries. Certainly, in the aggregate-producing industry the evidence suggests a habitual, fairly exclusive attachment to the aggregate transport business. I do not have enough information to attempt to assess how difficult it may be to deal with this tendency to a one-industry focus in work selection by owner/operators in developing an integrated marketing scheme, but in the planning of any such scheme account will have to be taken of that tendency and there may need to be short-run arrangements of a separate nature looking to integration as a longer term goal. Certainly, an integrated system would be more efficient in marketing owner/operated dump truck services generally but if in the aggregate-producing industry there should exist some deep-seated resistance from owner/operators to accepting work outside the aggregate transport business (or in the roadbuilding industry to accepting work hauling aggregate), that would be a human complication of which any plan would have to take account.

E. Relationship of the Marketing Scheme to the Construction Industry and to the Owner/Operator Dump Truck Industry Generally

This is an appropriate place to mention what I believe to be the largely artificial distinction which I am maintaining for purposes of this report between

the roadbuilding industry and the construction industry in general. My terms of reference confine me to a consideration of the application of the dependent contractor provisions in the aggregate-producing and roadbuilding industries. The terms of reference of the Inquiry were, of course, advertised and, as a result, the information I received did not for the most part address the employment of dump trucks in the construction industry at large. Thus, there are both formal and practical limits to my ability to deal with the question of the application of the dependent contractor provisions in the construction industry generally. Nevertheless, as I have mentioned previously,[12] it is impossible not to recognize that the questions concerning the means of organizing and the propriety of organizing Professor Arthurs' countervailing power on behalf of owner/operators of dump trucks in the aggregate-producing and roadbuilding industry - questions to which, as we have seen, any inquiry into the application of the dependent contractor provisions of the Labour Relations Act in any industry must inevitably lead - cannot be sensibly addressed without recognizing the fact that the business of owning and operating dump trucks is a broadly based business in respect of which the aggregate-producing industry and the roadbuilding industry are only particular markets. Any solution must take realistic account of the entire dump truck industry including the utilization of dump trucks in the construction industry generally.

Accordingly, in my view, any formulation and test of a collective marketing scheme would have to consider the relationship between the proposed scheme in the aggregate-producing and roadbuilding industries and the utilization of dump trucks in other segments of the construction industry. On the basis of what little information I do have concerning the use of dump trucks in the construction industry, I expect that the answer will be that it is both sensible and necessary

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[12] See Part I, p. 83.

to extend the marketing scheme to include the whole of the construction industry and indeed to cover all potential markets for owner/operated dump truck equipment.